

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

#### CONCLUSION OF MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Morning business is now closed.

#### FLAG DESECRATION AMENDMENT

The ACTING PRESIDENT pro tempore. Under the previous order, the hour of 4 p.m. having arrived, the Senate will proceed to the immediate consideration of S.J. Res. 12, which the clerk will report.

The legislative clerk read as follows:

A joint resolution (S.J. Res. 12) proposing an amendment to the Constitution of the United States authorizing Congress to prohibit the physical desecration of the flag of the United States.

The Senate proceeded to consider the joint resolution which had been reported from the Committee on the Judiciary, with an amendment, as follows:

[Omit the part struck through and insert the part printed in italic.]

S.J. RES. 12

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States [within 7 years after the date of its submission by the Congress] within seven years after the date of its submission for ratification:*

#### "ARTICLE

"The Congress shall have power to prohibit the physical desecration of the flag of the United States."

The ACTING PRESIDENT pro tempore. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, the Judiciary Committee, which I chair, has reported to the floor an amendment to the Constitution of the United States which would authorize legislation to prohibit burning of the American flag.

The Supreme Court of the United States, in *Texas v. Johnson* in 1989 and again in *United States v. Eichman* in 1990, in a 5-to-4 decision ruled that the first amendment to the U.S. Constitution relating to freedom of speech would be violated by legislation which prohibited flag burning.

At the outset of the debate on this amendment, it is vital to note that the pending amendment does not seek to alter the language of the first amendment. The first amendment of the U.S. Constitution protecting speech, religion, press, and assembly is inviolate, really sacrosanct. But that is not to say the decisions of the Supreme Court of the United States have that same status.

We have, since the adoption of the U.S. Constitution in 1787 and the Bill of Rights, the 10 amendments, in 1791,

held freedom of speech as one of our highest values, along with freedom of religion, freedom of the press, the right to assemble, and the right to petition the Government. But decisions by the Supreme Court of the United States are, in a sense, transitory. They have the final word, and we respect their judgment, but our constitutional process allows for amendments in a complicated way. It has to pass both Houses of the Congress by two-thirds vote and then be ratified by three-fourths of the States. So it is a high bar to change what the Supreme Court of the United States says the Constitution means.

The five Justices who found the first amendment violated are Justice Brennan, Justice Marshall, Justice Blackmun, Justice Scalia, and Justice Kennedy. The four Justices in dissent were Chief Justice Rehnquist, Justice White, Justice O'Connor, and Justice Stevens. So had the Court been slightly differently constituted, we wouldn't be talking about a constitutional amendment.

It is important to focus on the basic fact that the text of the first amendment, the text of the Constitution, the text of the Bill of Rights, is not involved. It is the decision by the Supreme Court, it is the decision where any one of five made a majority. It is that difference of opinion that is at issue, and it is important to note that when decisions are rendered by the Supreme Court of the United States, they are the "opinion" of the Court. There is no verity, there is no absolutism, unlike what might be contended for the Constitution itself, especially the first amendment.

It is important to note that there have been many decisions by the Supreme Court of the United States which have limited freedom of speech under the first amendment. The first case which comes to mind is the famous opinion by Justice Oliver Wendell Holmes saying that an individual could not cry "fire" in a crowded theater. People have a right to speak, but there are limitations as to how people may exercise freedom of speech, and that is one limitation.

A Supreme Court decision in *Chaplinsky v. New Hampshire* in 1942 had special significance when the Court decided that fighting words were not protected by the constitutional protection of freedom of speech. The defendant in a criminal case had used condemnatory curse words, a fight resulted, and he was convicted. The Court said freedom of speech did not go that far and upheld his conviction.

The Court observed in that case a standard which is significant, and that is:

It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

I believe that standard applies to flag burning.

We have had other instances where the Supreme Court of the United States has limited freedom of speech. For example, on inciting unlawful conduct, you can say what you please, but you cannot incite others to unlawful conduct and then defend on the ground of freedom of speech.

Obscenity cases are another line of decisions, complex decisions, conduct which is gauged by contemporary community standards and the question of whether the speech has its dominant appeal to prurient interests. It is pretty hard to define what that means. That was a definition I wrestled with consistently when I was assistant attorney of Philadelphia to make a determination as to where freedom of expression and freedom of speech crossed the line.

On pornography, which is a lesser standard, you don't have to go to the level of obscenity on pornography if children are involved. There again, the first amendment protection for freedom of speech does not cover it.

An individual in our society does not have the constitutional right to make false statements of fact, but that individual may be taken to a court of law, sued, and damages collected for slander, verbal false statements of fact, or libel, written false statements of fact.

Similarly, the first amendment does not protect speech which constitutes threats of violence. And just last month in a widely noted case, the Supreme Court decided that governmental employees have limits on what their speech can contain.

The *Chaplinsky* decision, which I cited a few moments ago, sets a standard which, as a generalization, notes that there will not be protection for utterances which are no essential part of any exposition of ideas and therefore are of slight social value.

It is my opinion—and again, I denominate it as an opinion, just as the Supreme Court of the United States denominates its decisions as opinions. We all have our own opinions. We are all entitled to our own opinions. If there are enough opinions to the contrary of the five Supreme Court Justices—that is, the opinions of two-thirds of the Senate and two-thirds of the House of Representatives and three-fourths of the legislatures of the States—then we may make a modification of what the Supreme Court has said in declaring that flag burning is protected by freedom of speech.

It is my sense that under the Supreme Court decision in *Chaplinsky*, we are dealing with conduct which is not an essential part of an exposition of ideas and does not have social value as a step to the truth, and that whatever is derived from it is clearly outweighed by the social interest in order and tranquility. It is my view that flag burning is a form of expression which is spiteful or vengeful or designed to antagonize, designed to hurt. It is not designed to persuade.

Again referring to the opinion of perhaps America's greatest Jurist, Oliver

Wendell Holmes, on the Supreme Court in the case *Abrams v. United States*, decided in 1919, Justice Holmes noted that time has upset many fighting faiths. Time has upset many fighting faiths, and ideas and concepts and doctrines which men and women think are veritable truths may turn out not to be so. That opinion which I studied in law school a few years ago made the deepest impression on me of any which I have ever read. I think that is really the hallmark of freedom of speech, and that is in the context of seeking to persuade the marketplace of ideas. When Holmes said that time has upset many fighting faiths, he was extraordinarily prescient in that declaration.

In evaluating the speech issue and in evaluating what I believe is an appropriate resolution of the pending constitutional amendment, I think of the veterans in our society and I think of the veterans' expectation of the sanctity of the flag. I think of the flag as a symbol of what veterans fought for, what they sustained wounds for, what they sustained loss of limbs for, and what they sustained loss of life for.

In being the chairman of the Senate Veterans' Affairs Committee for some 6 years and a ranking member a number of years beyond, I had more duties than most would on veterans' issues. The veterans, with some substantial justification, repeatedly made the point at our hearings that they were not treated right for the sacrifices they had made; that when it came to compensation and disability, the Nation which has called upon them to fight wars and sustain wounds and sustain loss of limbs, comrades who have given their lives, the Nation was not very appreciative or grateful or didn't reciprocate with the kinds of benefits to which the veterans thought and think they are entitled to. It is a continuing battle, given the budget limitations.

The Congress of the United States is very much concerned about veterans' rights and veterans' benefits, and we make an effort, but in so many cases, it has been my judgment, reflected in my views and my votes and my chairmanship of the Veterans' Affairs Committee, that we are not sufficiently considerate, and not a matter of being generous but not sufficiently just with our veterans.

When it comes to the issue of flag burning, I have heard many veterans express deep concern about disrespect for the American flag, which they equate as disrespect for them, disrespect for the sacrifices they and their buddies have made.

I think of my brother's service in the U.S. Navy, and I think of Morton Specter, who served in the U.S. Navy in World War II. I think of the service of my brother-in-law, Arthur Morgantern, who served in the South Pacific for 31 months and came home to find a 2-year-old baby daughter from whom he had been separated for a protracted period of time, and fortunately came home in time.

My own service stateside during the Korean war was something I was proud to do. I did not face the rigors of combat, although when you are in the service, you respond to what the service tells you to do.

I also think of the service of my father, Harry Specter, an immigrant. It always makes me mindful of immigrants who have built this country. My mother, too, was an immigrant. She came at the age of 6 with her family from the Ukraine. I have had some comments about their contributions to this country in another context as we have talked about immigration reform, which is now pending before the conference committee of the House and Senate. My father came to this country at the age of 18, in 1911. The czar wanted to send him to Russia, and he wanted to go to Kansas.

As I say sometimes in jest, it was a close call, but he got to go to Kansas. But he didn't know that when he sailed steamer from Europe to the United States, he had a round-trip ticket to France—not to Paris and the dancing girls, but to the Argonne Forest. It took exactly 30 days for the U.S. Army to induct Harry Specter in Fairbrook, NE, and ship him overseas. He didn't have a whole lot of training, but he was "cannon fodder," as they expressed. These Doughboys were meant for the enemy German cannons. They all had a bull's eye painted on their back. He went to war, and he was wounded in action. He was struck by shrapnel, and he carried shrapnel in his legs until the day he died.

When my father was in need of medical care, when he had a serious accident where a spindle bolt broke on a pickup truck when my sister was driving and rolled over and broke his arm, he was taken to the veterans hospital in Wichita, KS, where we lived. I was 7 at the time and would ride a bicycle out many miles from the residential section of town to where the veterans hospital was located. Now it is all built up. I had some exposure to the veterans there, and I have had exposure to veterans as I have traveled around Pennsylvania and on a trip I made in 1991 around the country to look at veterans' hospitals when I was on the Veterans' Affairs Committee to see if we had adequate care for the veterans who might come back injured from the Gulf War. Fortunately, we did not have many casualties from the Gulf War in 1991.

I visited the veterans at Walter Reed, as so many of us have, to try to give them a morale uplift and to tell them how much we appreciate their service. It is very difficult for those who go to visit them, with their artificial limbs and their loss of arms and their metallic legs. It is obviously disquieting to see them and realize how difficult, how tragic it is for them. Their spirits, by and large, are remarkable. But I think of our veteran population when I think about this amendment. I don't want to dwell on it overly, but I do not think it

is an irrelevancy when we consider this flag protection amendment and consider what the expectations are.

During the Memorial Day recess I had occasion to travel to Europe to visit veterans' cemeteries with the Veterans' Affairs Committee. Senator CRAIG, the chairman of the Veterans' Affairs Committee now, led a delegation with the distinguished Senator from North Carolina, Mr. BURR, who is presiding at the moment, and Senator JOHNNY ISAKSON from Georgia. I was along, and it was an enormously moving experience to see the rows of white crosses and the rows of Stars of David. We went to the cemeteries in the Netherlands. We went to the cemeteries in northern France not too far from the Argonne Forest where my father had fought. We went to the cemetery in Normandy and saw those steep cliffs and marveled at how our troops, on June 6, 1944, could scale those cliffs to lead to the invasion of Europe and free the world of the despotism of Nazi Germany and Hitler's annihilation of 6 million Jews and the treachery of Mussolini and the treachery of the war in the Pacific with the Japanese.

I made a report to the Senate—as I do on my foreign travel—a week ago today. I noted in that report that when my father, Harry Specter, was hit by shrapnel in the legs, the possibility—as I saw in viewing the World War I cemeteries—noted that in World War I, there were 126,000 deaths; in World War II, 407,300 deaths; and, of course, Harry Specter was not in one of the cemeteries. But had the shrapnel hit him a little higher, Harry Specter might have been in one of those cemeteries and he wouldn't have been my father and I wouldn't have been. Of all the sobering thoughts, none can compare to that one.

I have voted on the constitutional amendment in the past when, years ago, I voted in favor of the constitutional amendment to protect the flag, so these thoughts are not new to me or a change of heart. But it is my view that given the expectation of so many Americans, especially American veterans, and given the fact that the text of the first amendment is in no way altered by this amendment, but it is only a decision by the Supreme Court of the United States, the opinion of five that freedom of speech precludes flag burning, and the opinion of four Justices that freedom of speech should not preclude flag burning, it is my opinion that the opinions of the five Justices ought not to dominate, and the opinions of the four Justices ought to dominate, provided that their opinion is the opinion of two-thirds of this body, two-thirds of the House, and the opinion of three-quarters of the State legislatures, which provides the constitutional basis for a constitutional amendment.

I ask unanimous consent that the full text of my printed statement be printed in the RECORD.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

2006 FLAG AMENDMENT

Mr. President, I seek recognition today to support Senate Joint Resolution 12, which proposes a constitutional amendment allowing Congress to prohibit the physical desecration of the American flag. I will vote in support of this resolution. I do not take this step lightly. Just three weeks ago, I voted against a proposed constitutional amendment to define marriage as the union of one man and one woman. I did so not because I do not support traditional marriage, but because I believe that we have not reached the point in time where the extraordinary measure of a constitutional amendment has become necessary. The states have shown that they are willing and able to preserve traditional marriage, and the Supreme Court has not stepped in to take that power away from them.

With regard to the protection of our most cherished national symbol, though, we have unfortunately reached the point where we cannot protect our flag by any means short of a constitutional amendment. In 1989, the Supreme Court's 5-4 decision in *Texas v. Johnson* stripped from the people the ability—through their elected representatives—to make laws to protect our flag. Prior to the *Texas v. Johnson* decision, 48 states had laws on the books prohibiting flag desecration. There was also a 1968 federal law in place to prohibit desecration of the flag. The 1968 law made it a crime to “knowingly cast contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it.” (Pub. L. 90-381.)

These state and federal laws existed because it appeared to be beyond question that we could act to protect the American flag. In addition to the law prohibiting flag desecration, Congress had prescribed detailed rules for the flag's design, the times and occasions for its display, and particular protocols for conduct during the raising, lowering, and passing of the flag. In 1907 in *Halter v. Nebraska*, the Supreme Court upheld the constitutionality of a Nebraska statute that prohibited the use of the flag for advertising purposes.

In later years, the Court continued to recognize the right of the people to protect our flag. In *Spence v. Washington*, the Court struck down a student's conviction for taping a peace symbol to a flag. But in striking down the conviction, the Court was careful to note that the defendant “did not permanently disfigure the flag or destroy it.” In the same year, in *Smith v. Goguen*, the Court held that a Massachusetts flag misuse statute was impermissibly vague, but explained that “nothing prevents a legislature from defining with substantial certainty what constitutes forbidden treatment of United States flags.” In his concurrence, Justice White went even further, stating that “[t]he flag is a national property, and the Nation may regulate those who would make, imitate, sell, possess, or use it. I would not question those statutes which proscrib[e] mutilation, defacement, or burning of the flag or which otherwise protect its physical integrity . . . .”

In *Street v. New York* in 1969, the Court struck down a protester's conviction for flag burning, but only because it was unclear whether he was arrested for his conduct in defacing the flag or for the statements he made as he did so. Dissenting from the 5-4 majority opinion, Chief Justice Earl Warren explained that “the States and the Federal Government do have the power to protect the flag from acts of desecration and dis-

grace.” Justice Hugo Black, the ardent exponent of First Amendment absolutism, stated in his dissent that, “[i]t passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American flag an offense.”

And Justice Abe Fortas articulated “the reasons why the States and the Federal Government have the power to protect the flag from acts of desecration committed in public.” He explained that the flag is “traditionally and universally subject to special rules and regulation,” and that ownership of a flag is “subject to special burdens and responsibilities.” Although “[a] flag may be property, in a sense,” “it is a property burdened with peculiar obligations and restrictions” and “these special conditions are not per se arbitrary or beyond governmental power under our Constitution.”

In light of these repeated statements of support for the flag from the Supreme Court, it was a surprise when a bare, five-justice majority of the Court in *Texas v. Johnson* struck down Texas's flag protection act and invalidated the laws of 48 states and the federal government.

Congress reacted swiftly to protect the flag by passing the Flag Protection Act of 1999, which made it a crime to knowingly mutilate, deface, physically defile, burn, keep on the ground or floor, or trample upon the United States flag. We tried to work within the confines of *Texas v. Johnson* to ensure that the Flag Protection Act would not target expressive conduct based on the content of its message. But the very next year, in *United States v. Eichman*, five justices of the Supreme Court the same five justices who struck down the Texas statute in *Texas v. Johnson*, held that Congress could not protect the flag through even a neutral desecration statute.

This amendment is an extremely narrow solution to correct those two opinions in the only way the American people can. For 198 years, from the ratification of the Bill of Rights in 1791 until the *Texas v. Johnson* decision in 1989, the states and the Congress were free to protect the flag from desecration and defilement. Can it be reasonably argued that, for those 198 years, Americans lacked the freedom of speech guaranteed by the First Amendment?

I question whether defilement of the flag should even be considered “speech” protected by the First Amendment. To quote Chief Justice Rehnquist, dissenting in *Texas v. Johnson*:

“[F]lag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is more likely to be indulged in not to express any particular idea, but to antagonize others. . . . The Texas statute deprived Johnson of only one rather inarticulate form of protest—a form of protest that was profoundly offensive to many—and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy.”

Flag burning is the equivalent of “fighting words,” those words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire*. Fighting words are just one category of expression that the First Amendment has never protected, for the First Amendment has never been a blanket cover for every conceivable form of expression. We have long recognized numerous exceptions to the First Amendment's freedom of expression, including: incitement to unlawful conduct; libel and slander; obscenity; child pornography; and threats of physical harm.

In other instances, we have balanced an interest in legitimate speech against overarching societal interests. For example, Con-

gress has passed copyright laws that limit a speaker's ability to use the words of another person. The Supreme Court has also held that government employees do not have an absolute right to free speech for statements made in the workplace.

Just because conduct may have some expressive element, it does not mean that it is entitled to First Amendment protection. None of us would question the government's power to prohibit vandalism of the Washington Monument, the Vietnam Wall, or this beautiful Capitol building, even if the vandals were expressing his outrage with government policies. Indeed, Justice White stated in 1974 that “[t]here would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial. . . . The flag is itself a monument, subject to similar protection.” Just as we do not allow criminals to deface the symbols of our Nation that stand throughout this city, we should not allow vandalization and desecration of our most precious and most recognizable national symbol.

We do not limit the expressive rights of those who wish to voice dissatisfaction with our government by declaring flag desecration off-limits any more than we do by prohibiting desecration of our national buildings and monuments. The avenues for expressing dissent are still wide open—“a full panoply of other symbols and every conceivable form of verbal expression.”

All this amendment seeks to do is restore to Congress the power it held for those 198 years before five justices took it away in *Texas v. Johnson*: the power to protect our flag. That's all. The amendment itself does not even prohibit flag burning or other forms of flag desecration. The text of the amendment is very simple: “The Congress shall have power to prohibit the physical desecration of the flag of the United States.” In other words, the amendment says, let's give the people of the United States, through their elected representatives, the right to offer protection to our most cherished national symbol.

There are those who claim that because our liberties are enshrined in the Constitution, the flag is not properly viewed as the symbol of our liberty. They claim that those of us who support restoring to the people the ability to protect the flag are not true defenders of the Constitution. Those critics are wrong. One of the most important aspects of our constitutional system is its recognition that we may, from time to time, need to amend our founding document to reflect the will of the people. Article 5 gives the people this most important right. It takes a supermajority of Americans to do so—two-thirds of the people's elected representatives here in Congress and three-fourths of the states—so we can rest assured that our Constitution is only amended when it is absolutely necessary. But when the opinion of five unelected judges overrides the voice of the people expressed through 48 state laws and a national flag protection law, how can we say an amendment is not necessary?

Chief Justice Rehnquist stated in *Texas v. Johnson* that: “The cry of ‘no taxation without representation’ animated those who revolted against the English Crown to found our Nation—the idea that those who submitted to government should have some say as to what kind of laws would be passed. Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people whether it be murder, embezzlement, pollution, or flag-burning.”

Our Constitution lives by giving the American people a means to raise their voices over the words of five justices here in Washington. The American people have called on

the members of this body to protect our most cherished national symbol, and I agree with that sentiment.

Mr. LEAHY. Mr. President, it is my understanding we are now on the constitutional amendment.

The ACTING PRESIDENT pro tempore. The Senator is correct.

Mr. LEAHY. I thank the Chair.

Mr. President, in 1791, the year that the Bill of Rights became part of our Constitution, the State of Vermont joined the Union, and then the State of Kentucky followed. Then Congress saw fit to change the design of the American flag to include 15 stars and 15 stripes, one for each State. In fact, it was this flag, the one recognizing the addition of Vermont and Kentucky to the United States, that flew over Fort McHenry in 1814 and that inspired Francis Scott Key to write the "Star-Spangled Banner."

Fifty years after that famous battle that inspired our National Anthem in Baltimore's harbor, President Abraham Lincoln visited that city as our country confronted its greatest test. It was a time in which this Nation faced grave peril from a civil war whose outcome could not yet be determined. Many flags flew over various parts of the United States, and our existence as a nation was in doubt. President Lincoln used the occasion to reflect on a basic feature of American democracy. President Lincoln observed:

The world has never had a good definition of the word liberty. The American people just now are much in need of one. We all declare for liberty, but using the same word we do not mean the same thing.

I would hope that all of us in this Chamber champion liberty. If any of us were asked, we would say: Of course we do. But when I hear some talk about the desire to restrict our fundamental freedoms by cutting back on our first amendment rights for the first time in our history, you see why people wonder. The danger of this amendment is that it would strike at the values the flag represents and the rights that have made this Nation a vibrant democratic republic in which we have enjoyed freedom of religion, freedom of the press, freedom of expression, and freedom to think as individuals.

Along with Vermonters, I find the American flag inspirational in all its incarnations, whether it is the current flag with 50 stars that was carried in formation at Parris Island when my youngest son Mark became a proud member of the U.S. Marine Corps; whether it is the American flag with 48 stars under which Vermonters joined in fighting World War II, including members of my family; the flag commemorating Vermont's becoming a State; the Bennington flag that commemorated our Declaration of Independence; or the revolutionary flag with 13 stars in a circle said to be designed by George Washington and sewn by Betsy Ross.

Ultimately, the debate over this amendment turns on the scope we

think proper to give to speech which deeply offends us. For two-thirds of the Senate to vote to amend the Bill of Rights to amend the U.S. Constitution because, as the Constitution requires, that we deem it "necessary" in 2006, strikes me as extraordinary. The Senate oath of office, which the people of Vermont have authorized me to take six times, requires that we "support and defend the Constitution." And I believe that doing so means opposing this effort to cut back on Vermonters' constitutional rights and freedoms.

Regrettably, the Senate leadership is returning again and again to using constitutional amendments as election year rallying cries to excite the passion of voters. That is wrong. The Constitution is too important to be used for partisan political purposes—and so, in my view, is our American flag.

With the rights of Americans being threatened in so many ways today by this administration, this is most especially not the time for the Senate to vote to limit Americans' fundamental rights or to strike at the heart of the First Amendment.

The chairman has referred to Justice Oliver Wendell Holmes. It was Justice Holmes who wrote that the most imperative principle of our Constitution was it protects not just freedom for the thought and expression we agree with, but "freedom for the thought that we hate." He also wrote that "we should be eternally vigilant against attempts to check the expression of opinions that we loathe."

We all know that the First Amendment never requires people to defend it when it is upholding popular speech. It needs defense when the speech is unpopular.

What is so distinctive about America is that our Government does not endorse religious or political orthodoxy. The price of our freedom of expression is our willingness to protect the expression of those with whom we disagree. America does not impose a state-designed dogma on its free people the way totalitarian regimes do. We value our freedom and we protect the freedom of others.

Justice Robert Jackson made this point with unsurpassed eloquence in a Supreme Court decision made during World War II. He did this in *West Virginia State Board of Education v. Barnette*. His decision for the Supreme Court upheld our fundamental tradition of tolerance, holding that State school boards may not compel teachers and students to salute the flag.

Remember, Justice Jackson was writing during World War II—during wartime. He wrote:

[Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.

That was a powerful statement by Justice Jackson, at a time when certainly the attention of this country was focused on a real war effort, the effort of World War II. But he knew what unifies our country is the voluntary sharing of ideals and commitments. Americans are free, free to offend but also free to respond to crude insults with responsible action—the way many of us remember and applaud—when that crowd at Dodger Stadium responded by spontaneously singing "God Bless America" when a couple of miscreants attempted to burn the American flag in the outfield 30 years ago, shortly after the end of the Vietnam war.

When I am home in Vermont, our family home, I fly the flag—not because the law tells me to but because, as an American, I want to. I fly the flag out of pride. I remember my parents, still alive, when they used to look with pride to see that flag flying and they knew their son was home from Washington. It is the same sense of pride I felt when I saw my son march in uniform under that flag, our flag, our American flag. It is the same sense of pride I feel when I see that flag flying over this Capitol Building when I come to work each day, and I stop and look at it sometimes when the Senate leaves at 2 or 3 o'clock in the morning. I look at the dome and I see that flag illuminated and flying there.

One of my colleagues, former Senator Bob Kerrey, a man of great bravery, who received the Congressional Medal of Honor for his bravery in battle, said in a recent opinion piece in the *Washington Post*, "Real patriotism cannot be coerced." It has to be a voluntary, unselfish, brave act to sacrifice for others.

I ask unanimous consent that a copy of his op-ed be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the *washingtonpost.com*, June 15, 2006]

OUR FLAG AND OUR FREEDOM  
(By Bob Kerrey)

With campaigns at full tilt and the Fourth of July just around the corner, the Senate's new priority is to debate and vote on yet another resolution to amend our remarkable Constitution. This time it's an amendment that would allow Congress to prohibit a form of protest that a large majority of Americans do not like: the burning or desecration of the American flag. Since 1989, when the Supreme Court decided unanimously and correctly that these rare, unpleasant demonstrations are expressions of speech and therefore protected by the First Amendment, there have been many such attempts. Fortunately, all have failed.

Unfortunately, enthusiasm for this amendment appears to have grown even as flag-burning incidents have vanished as a means of political protest. The last time I saw an image of the U.S. flag being desecrated in this way was nearly 20 years ago, when the court issued its decision. Thus this amendment—never appropriate in the oldest democracy on earth—has become even less necessary. But necessity is not always the mother of legislation.

In defense of speech I do not like, I recall a ceremony I have come to love: a military funeral. The finest of all is conducted at Arlington National Cemetery. At graveside, an honor guard holds the American flag while taps are played as a final farewell. The guards then fold the flag into a triangle and deliver it to the next of kin.

It is as if the flag becomes the fallen. In the hands of a widow or mother it is much more than a symbol of the nation. At that moment the American flag is a sacred object that holds the sweet memory of a life given to a higher cause. Or so it seems to me each time I am witness to these hallowed events.

To others the ceremony may mean something entirely different. I recall vividly one such situation: A mother of a friend who was killed in Vietnam recoiled when the flag was offered to her. She would not take it. In her heart the American flag had become a symbol of dishonor, treachery and betrayal. At the time, and perhaps to her dying day, she wanted nothing to do with it.

If our First Amendment is altered to permit laws to be passed prohibiting flag desecration, would we like to see our police powers used to arrest an angry mother who burns a flag? Or a brother in arms whose disillusionment leads him to defile this symbol of the nation? I hope the answer is no. I hope we are strong enough to tolerate such rare and wrenching moments. I hope our desire for calm and quiet does not make it a crime for any to demonstrate in such a fashion. In truth, if I know anything about the spirit of our compatriots, some Americans might even choose to burn their flag in protest of such a law.

No doubt the sponsors and advocates of this amendment mean well. They believe it is a reasonable and small sacrifice of our freedoms. They believe no serious consequence will come of this change.

No doubt, too, some of the increasing interest in limiting free speech is a response to the Sept. 11 attacks on the United States. It was a remarkable moment, when the hearts of most of us filled with a kind of pure patriotism we had never felt before. It was a patriotism that bound liberty to equality and fraternity. It was a patriotism that brought us together, friend and stranger alike. We discovered heroes who inspired us. No longer did we say, "It's good to see you," and not mean it.

Most impressive to me was that the "we" included men and women of many nations, every religion and every ethnic group. The "we" was global. The patriotism we felt extended beyond our boundaries and beyond the cramped spaces of ritual nationalistic fervor. We understood that the vulnerability of our freedom bound us together more than any symbol or slogan can. Millions of Americans, then and now, proudly flew their flags because they wanted to, not because any law told them to.

All the more reason, then, for patriotism to turn aside the understandable impulse to protect our flag by degrading the constitutional freedoms for which it stands. Real patriotism cannot be coerced. Our freedom to speak was attacked—not our flag. The former, not the latter, needs the protection of our Constitution and our laws.

Mr. LEAHY. The French philosopher Voltaire once remarked that liberty is a guest who plants both of his elbows on the table. I think what Voltaire meant by that is that liberty is sometimes even an unmannerly, vulgar guest, yet liberty requires we tolerate rudeness even when admittedly it is hard to do so. That is what allows us, in turn, the individual freedoms that we cherish for ourselves.

Despicable, outrageous gestures like flag burning are hard to tolerate, but we do so because political expression is so central as to what makes America great and what protects the rights of each of us to speak, or to worship as we choose, and to petition our Government for redress. The flag is a symbol of the greatness that the American ideals of freedom and liberty have helped foster in this blessed land. The Constitution ultimately goes beyond symbols. The Constitution is the real bedrock of our rights.

In a letter to me expressing his opposition to the constitutional amendment, my friend General Colin Powell said it very well. Let me quote Colin Powell in this regard. He said:

We are rightfully outraged when anyone attacks or desecrates our flag. Few Americans do such things and when they do they are subject to the rightful condemnation of their fellow citizens. They may be destroying a piece of cloth, but they do no damage to our system of freedom which tolerates such desecration. . . .

I understand how strongly so many of my fellow veterans and citizens feel about the flag. . . . I feel the same sense of outrage. But I step back from amending the Constitution to relieve that outrage. The First Amendment exists to insure that freedom of speech and expression applies not just to that with which we agree or disagree, but also that which we find outrageous.

I would not amend that great shield of democracy to hammer a few miscreants. The flag will still be flying proudly, long after they have slunk away.

What powerful, powerful words from General Powell. I ask unanimous consent a copy of his letter be printed in the RECORD.

There being no objection, the material was ordered to be printed in the Record, as follows:

ALEXANDRIA, VA,  
May 18, 1999.

Hon. PATRICK LEAHY,  
U.S. Senate,  
Washington, DC.

DEAR SENATOR LEAHY: Thank you for your recent letter asking my views on the proposed flag protection amendment.

I love our flag, our Constitution and our country with a love that has no bounds. I defended all three for 35 years as a soldier and was willing to give my life in their defense.

Americans revere their flag as a symbol of the Nation. Indeed, it is because of that reverence that the amendment is under consideration. Few countries in the world would think of amending their Constitution for the purpose of protecting such a symbol.

We are rightfully outraged when anyone attacks or desecrates our flag. Few Americans do such things and when they do they are subject to the rightful condemnation of their fellow citizens. They may be destroying a piece of cloth, but they do no damage to our system of freedom which tolerates such desecration.

If they are destroying a flag that belongs to someone else, that's a prosecutable crime. If it is a flag they own, I really don't want to amend the Constitution to prosecute someone for foolishly desecrating their own property. We should condemn them and pity them instead.

I understand how strongly so many of my fellow veterans and citizens feel about the flag and I understand the powerful sentiment in state legislatures for such an amendment.

I feel the same sense of outrage. But I step back from amending the Constitution to relieve that outrage. The First Amendment exists to insure that freedom of speech and expression applies not just to that with which we agree or disagree, but also that which we find outrageous.

I would not amend that great shield of democracy to hammer a few miscreants. The flag will be flying proudly long after they have slunk away.

Finally, I shudder to think of the legal morass we will create trying to implement the body of law that will emerge from such an amendment.

If I were a member of Congress, I would not vote for the proposed amendment and would fully understand and respect the views of those who would. For or against, we all love our flag with equal devotion.

Sincerely,

COLIN L. POWELL.

P.S. The attached 1989 article by a Vietnam POW gave me further inspiration for my position.

[From the Retired Officer, Sept. 1989]

THOUGHTS OF A FORMER POW: WHEN THEY  
BURNED THE FLAG BACK HOME  
(By James H. Warner)

In March of 1973, when we were released from a prisoner of war camp in North Vietnam, we were flown to Clark AB in the Philippines. As I stepped out of the aircraft I looked up and saw the flag. I caught my breath, then, as tears filled my eyes, I saluted it. I never loved my country more than at that moment. Although I have received the Silver Star Medal and two Purple Hearts, they were nothing compared with the gratitude I felt then for having been allowed to serve the cause of freedom.

Because the mere sight of the flag meant so much to me when I saw it for the first time after five and a half years, it hurts me to see other Americans willfully desecrate it. But I have been in a Communist prison where I looked into the pit of hell. I cannot compromise on freedom. It hurts to see the flag burned, but I part company with those who want to punish the flag burners. Let me explain myself.

Early in the imprisonment the Communists told us that we did not have to stay there. If we would only admit we were wrong, if we would only apologize, we could be released early. If we did not, we would be punished. A handful accepted, most did not. In our minds, early release under those conditions would amount to a betrayal of our comrades, of our country and of our flag.

Because we would not say the words they wanted us to say, they made our lives wretched. Most of us were tortured, and some of my comrades died. I was tortured for most of the summer of 1969. I developed beriberi from malnutrition. I had long bouts of dysentery. I was infested with intestinal parasites. I spent 13 months in solitary confinement. Was our cause worth all of this? Yes, it was worth all this and more.

Rose Wilder Lane, in her magnificent book *The Discovery of Freedom*, said there are two fundamental truths that men must know in order to be free. They must know that all men are brothers, and they must know that all men are born free. Once men accept these two ideas, they will never accept bondage. The power of these ideas explains why it was illegal to teach slaves to read.

One can teach these ideas, even in a Communist prison camp. Marxists believe that ideas are merely the product of material conditions; change those material conditions, and one will change the ideas they produce. They tried to "re-educate" us. If we could show them that we would not abandon our beliefs in fundamental principles, then

we could prove the falseness of their doctrine. We could subvert them by teaching them about freedom through our example. We could show them the power of ideas.

I did not appreciate this power before I was a prisoner of war. I remember one interrogation where I was shown a photograph of some Americans protesting the war by burning a flag. "There," the officer said. "People in your country protest against your cause. That proves that you are wrong."

"No," I said. "That proves that I am right. In my country we are not afraid of freedom, even if it means that people disagree with us." The officer was on his feet in an instant, his face purple with rage. He smashed his fist onto the table and screamed at me to shut up. While he was ranting I was astonished to see pain, compounded by fear, in his eyes. I have never forgotten that look, nor have I forgotten the satisfaction I felt at using his tool, the picture of the burning flag, against him.

Aneurin Bevan, former official of the British Labor Party, was once asked by Nikita Khrushchev how the British definition of democracy differed from the Soviet view. Bevan responded, forcefully, that if Khrushchev really wanted to know the difference, he should read the funeral oration of Pericles.

In that speech, recorded in the Second Book of Thucydides' *History of the Peloponnesian War*, Pericles contrasted democratic Athens with totalitarian Sparta. Unlike the Spartans, he said, the Athenians did not fear freedom. Rather, they viewed freedom as the very source of their strength. As it was for Athens, so it is for America—our freedom is not to be feared, for our freedom is our strength.

We don't need to amend the Constitution in order to punish those who burn our flag. They burn the flag because they hate America and they are afraid of freedom. What better way to hurt them than with the subversive idea of freedom? Spread freedom. The flag in Dallas was burned to protest the nomination of Ronald Reagan, and he told us how to spread the idea of freedom when he said that we should turn America into a "city shining on a hill, a light to all nations." Don't be afraid of freedom—it is the best weapon we have.

Mr. LEAHY. Another American who honorably served our country, Gary May, Chairman of Veterans Defending the Bill of Rights, wrote in a letter:

This country is unique and special because the minority, the unpopular, the dissident also have a voice. The freedom of expression, even when it hurts the most, is the truest test of our dedication to the principles that our flag represents.

I ask unanimous consent a copy of his letter be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

#### VETERANS DEFENDING

#### THE BILL OF RIGHTS,

Newburgh, IN, May 4, 2006.

*Re Oppose S.J. Res. 12, the Flag Desecration Constitutional Amendment.*

DEAR SENATOR: My name is Gary May. I am writing to you today as the chair of a group called Veterans Defending the Bill of Rights to urge you to oppose S.J. Res. 12, the flag desecration constitutional amendment. I know you hear from some who say veterans support this amendment, but you should also know that there are many veterans that have faithfully served our nation who strongly believe that amending the Constitution to ban flag desecration is the antithesis of freedoms they fought to preserve.

I lost both my legs in combat while serving in the U.S. Marine Corps in Vietnam. I challenge anyone to find someone who loves this country, its people and what it stands for more than I do. It offends me when I see the flag burned or treated disrespectfully. But, as offensive and painful as this is, I still believe that dissenting voices need to be heard, even if their methods cause offense.

This country is unique and special because the minority, the unpopular, the dissident also have a voice. The freedom of expression, even when it hurts the most, is the truest test of our dedication to the principles that our flag represents.

In addition to my military combat experience, I have been involved in veterans' affairs as a clinical social worker, program manager, board member of numerous veterans organizations, and advocated on their behalf since 1974. Through all of my work in veterans' affairs, I have yet to hear a veteran say that his or her service and sacrifice was in pursuit of protecting the flag.

When confronted with the horrific demands of combat, the simple fact is that most of us fought to stay alive. The pride and honor we feel is not in the flag per se. It's in the principles for which it stands for and the people who have defended them.

I am grateful for the many heroes of our country. All the sacrifices of those who served before us would be for naught, if the Constitution were amended to cut back on our First Amendment rights for the first time in the history of our great nation. I write to you today to attest to the fact that many veterans do not wish to exchange fought-for freedoms for protecting a tangible object that represents these freedoms.

To illustrate my point, here is what some of the Veterans Defending the Bill of Rights have said about this amendment:

"During the fighting in Iraq, I saw friends of mine die in battle. Each of us suffered and sacrificed to provide freedom to the Iraqi people. With this in mind, I am profoundly disturbed by the apparent willingness of Congress to sacrifice our own freedoms here at home by amending the First Amendment for the first time ever. When the coalition forces entered Iraq, it was to topple a brutal and repressive dictatorship, one that did not hesitate to jail and torture its own citizens who protested against it. By amending the Constitution to ban a form of expression, Congress dishonors the legacy of servicemembers who fought and died in defense of freedom."—Jeremy Broussard, Bowie, MD, a combat veteran of Operation Iraqi Freedom and a former Captain in the U.S. Army whose artillery unit was among the first to enter Iraq.

"The proposed constitutional amendment is in my eyes, and the eyes of countless other veterans, a slap in the face to our service in combat. We volunteered to go to war to protect the freedoms in this country, not watch them be taken away by politicians who have never been to the front lines. I consider myself an independent-minded conservative, and believe that creating unnecessary amendments to the U.S. Constitution is a betrayal of conservative principles."—Specialist Eric G. Eliason, Englewood, CO, a combat veteran who served as an Infantryman in the Army for three years, including one year overseas as part of Operation Iraqi Freedom.

"It is a bad thing to burn the flag, but it is a worse thing to damage the Constitution."—James Pryde, Tuskegee Airman, combat veteran of the 477 Bomber Group in WWII.

"After devoting most of my career to working in military intelligence, I was appointed Army Deputy Chief of Staff for Intelligence in 1997. I served in that position until

my retirement in 2000. I am well acquainted with the many threats facing the United States, and I must say that flag burning does not begin to rise to a level of threat justifying the attention of this distinguished body... I served in the United States Army, like my father before me, to defend fundamental American liberties. To begin the trend of amending the First Amendment each time a particular form of speech is found to be offensive sets a dangerous precedent, and undermines the very freedoms for which I and my fellow servicemembers served."—Lt. General Claudia J. Kennedy (USA, Ret.). Highest ranking woman to ever serve in the U.S. Army.

"Like many of those who have served in the armed forces, I am deeply concerned about this proposed attempt to undermine free speech. While I do take offense at disrespect to the flag, I nonetheless believe it my duty to defend the constitutional right of protestors to use the flag in nonviolent speech."—Richard Olek, Fargo, ND, Army veteran and past Commander of AMVETS Jon A. Greenley Memorial Post 7 in Fargo.

"Today the U.S. Senate is again debating an amendment to the Constitution to ban desecration of the flag. It's an issue on which I believe I can claim some authority. I laid my life on the line and fought under the flag of the United States during World War II. I watched some of my closest friends fall during eight grueling campaigns. I was awarded a Silver Star and Purple Heart. I'm a disabled veteran and long standing Republican since 1940, and nothing angers me more than the desecration of the U.S. flag. It is an abomination to me and to other veterans. That said, though, I believe the push to amend the Constitution to criminalize flag burning is misguided. Our forefathers would spin in their graves to think: that our government would turn the established principle of free speech on its end and consider persecuting people who disagree with its actions."—James Bird, Lumberton, NJ, is a decorated veteran of World War II, where he survived eight campaigns in combat and was a liberator of the Dachau concentration camp.

"... to undertake to carve out an area of free speech and say that this or that is unpatriotic because it is offensive is a movement that will unravel our liberties and do grave damage to our nation's freedom. The ability to say by speech or dramatic acts what we feel or think is to be cherished not demeaned as unpatriotic ... I hope you will hear my plea. Please do not tinker with the First Amendment."—Reverend Edgar Lockwood, Falmouth, Massachusetts, served as a naval officer engaged in more than ten combat campaigns in WWII.

"My military service was not about protecting the flag; it was about protecting the freedoms behind it. The flag amendment curtails free speech and expression in a way that should frighten us all."—Brady Bustany, West Hollywood, California, served in the Air Force during the Gulf War.

"The first amendment to our constitution is the simplest and clearest official guarantee of freedom ever made by a sovereign people to itself. The so-called 'flag protection amendment' would be a bureaucratic hamstringing of a noble act. Let us reject in the name of liberty for which so many have sacrificed, the call to ban flag desecration. Let us, rather, allow the first amendment, untrammelled and unfettered by this proposed constitutional red tape, to continue be the same guarantor of our liberty for the next two centuries (at least) that is has been for the last two."—State Delegate John Doyle, Hampshire County, West Virginia served as an infantry officer in Vietnam.

"As a twenty two year veteran, combat experience, shot up, shot down, hospitalized

more than a year, Purple Heart recipient, with all the proper medals and badges I take very strong exception to anyone who says that burning the flag isn't a way of expressing yourself. In my mind this is clearly covered in Amendment I to the Constitution—and should not be 'abridged'."—Mr. Bob Cordes, Mason, Texas was an Air Force fighter pilot shot down in Vietnam. He served for 22 years from 1956 to 1978.

"Service to our country, not flag waving, is the best way to demonstrate patriotism."—Mr. Jim Lubbock, St. Louis, Missouri, served with the Army in the Philippines during WWII. His two sons fought in Vietnam, and members of his family have volunteered for every United States conflict from the American Revolution through Vietnam with the exception of Korea. His direct ancestor, Stephen Hopkins, signed the Declaration of Independence.

"The burning of our flag thoroughly disgusts me. But a law banning the burning of the flag plays right into the hands of the weirdoes who are doing the burning. . . . By banning the burning of the flag, we are empowering them by giving significance to their stupid act. Let them burn the flag and let us ignore them. Then their act carries no significance."—Mr. William Ragsdale, Titusville, Florida, an engineer who worked in the space industry for over 30 years, retired from the US Naval Reserve in 1984 with the rank of Commander, having served in the Navy for over forty years including active duty in both WWII and the Korean War. He has two sons who served in Vietnam.

"I fought for freedom of expression not for a symbol. I fought for freedom of Speech. I did not fight for the flag, or motherhood, or apple pie. I fought so that my mortal enemy could declare at the top of his lungs that everything I held dear was utter drivel . . . I fought for unfettered expression of ideas. Mine and everybody else's."—Mr. John Kelley, East Concord, Vermont, lost his leg to a Viet Cong hand grenade while on Operation Sierra with the Fox Company 2nd Battalion 7th Marines in 1967.

I hope you will join me and the Veterans Defending the Bill of Rights in opposing S.J. Res. 12, the flag desecration constitutional amendment. We must not allow this "feel good" measure to restrict freedoms for which so many veterans sacrificed so much. I look forward to working with you.

Sincerely,

GARY E. MAY.

Mr. LEAHY. I have been to countries, as have many of us, countries with dictators—countries like China and Cuba, the former Soviet Union. They require a law to protect their flags and their symbols. I have taken great pleasure in those countries to point out that America does not need the kind of laws they do. America protects our symbols. The American people honor our national flag out of respect, not out of fear that they may break a law. I point out to them what real freedom is, and it includes the freedom to dissent and to differ, even in ways that I would find obnoxious and offensive.

As the son of a printer, I was brought up to know how important the First Amendment is to maintaining our democracy. It allows us to practice any religion we want, or no religion if we want. It allows us to think as we choose and to express ourselves freely, even though others may disagree.

We do not have a state-imposed orthodoxy in this great and good coun-

try. Instead, we have freedom and diversity—diversity in religion, diversity in thought, diversity in speech, diversity that is guaranteed and protected by our Constitution, our Bill of Rights, and particularly the First Amendment. When you guarantee and protect diversity, then you guarantee and protect democracy. When you guarantee and protect diversity, by definition you are going to have a democracy. No real democracy exists without diversity. But when you exclude and stamp out diversity and freedom of thought and expression, you act to stamp out democracy.

We have seen this in history. In the former Soviet Union or other totalitarian governments of history, when they wanted to destroy democracy they started, sometimes in little ways at first, but ultimately to stamp out diversity in dissent.

American democracy has succeeded because we have fought to live with that unruly guest with his elbows on our table of which Voltaire spoke, and to tolerate speech and expressive conduct that probably virtually all of us here would find disrespectful and crude.

We protect dissent, not because we oppose liberty but because we love liberty.

Wendell Phillips, a great New England abolitionist, wrote:

The community which dares not to protect its humblest and most hated member in the free utterance of his opinion, no matter how false and hateful, is only a gang of slaves.

Probably no person disagreed more vehemently with Wendell Phillips on the burning issues of their day than Senator John C. Calhoun of South Carolina. Yet Senator Calhoun came to much the same conclusion in a speech he gave on the Senate floor, our Senate floor, in 1848, more than 150 years ago. Senator Calhoun said:

We have passed through so many difficulties and dangers without the loss of liberty that we have begun to think that we hold it by divine right from heaven itself. But it is harder to preserve than it is to obtain liberty. After years of prosperity the tenure by which it is held is too often forgotten; and I fear, Senators, that such is the case with us.

This is what Senator Calhoun said 150 years ago.

I am immensely proud to be given the privilege to be one of the two Senators who have the opportunity to represent the State of Vermont. Vermont has a proud tradition defending liberty and encouraging open debate. We are the State of the town meeting. If you want to experience open debate, I urge you to attend a Vermont town meeting. Everybody gets heard. Everybody gets heard about every disagreement, every differing view. A Vermont town meeting is as democratic as you can get. There is debate. There is expression. There is disagreement and agreement. There is freedom and democracy being lived.

In fact, Vermont for many years engaged in such a great and open debate

on this very issue of how best to approach protection of our flag. For years the Vermont General Assembly remained the only State legislature not to have passed a resolution in favor of a constitutional amendment. In January 2002 the Vermont Legislature passed a resolution, but it was written, interestingly, in a manner that shows Vermont's respect for the Constitution. It concludes that the Congress should take steps to "ensure that proper respect and treatment . . . always be afforded to the flag," but in ways consistent with the principles that the flag represents, foremost among these being, "the protection of individual freedoms enumerated in the First Amendment to the United States Constitution, including free speech."

Our Legislature stopped short of taking the easy way out and simply parroting a politically popular demand to amend the Constitution. Rather, Vermont remained true to its proud tradition of encouraging open debate and called on Congress to "explore all avenues available" to protect the flag from desecration. Vermont's actions are consistent with our strong tradition of independence and commitment to the Bill of Rights. Indeed, Vermont's own Constitution is based on our commitment to freedom and our belief it is best protected by open debate.

At one time, when we were afraid we might not have that chance for open debate, Vermont declared itself an independent republic. In fact, Vermont did not and would not become a State until 1791. That was the year the Bill of Rights was ratified. Following that tradition, this Vermonter is not going to vote to cut back on the First Amendment of the Bill of Rights for the first time since its adoption.

Vermont sent Matthew Lyon to Congress. He, incidentally, cast the decisive vote, Vermont's vote, for the election of Thomas Jefferson. That election was thrown into the House of Representatives. Had Matthew Lyon voted otherwise, Thomas Jefferson would not have become President. Matthew Lyon was the same House Member who was a target of a shameful prosecution under the Sedition Act in 1798. Why? For comments he made in a private letter. And the power of the U.S. Government, under that horrible act, came down on Matthew Lyon. He was locked up for daring to be so critical in a letter.

Vermonters showed what they thought of the Sedition Act and what they thought of trying to stifle free speech. While Matthew Lyon was in jail, Vermonters reelected him and sent him back to Congress. Along with our own lone Congressman, Congressman SANDERS, I am working on that commitment to having a post office named for Matthew Lyon in Vermont.

Vermont has stood up for the rights of free speech before and since. Vermont served the Nation during the dark days of McCarthyism. In one of the most remarkable and praise-worthy actions of any Senator from any

State, Vermont Senator Ralph Flanders stood up for democracy in opposition to the repressive tactics of Senator Joseph McCarthy. When so many others, both Republicans and Democrats, ran for cover, Senator Ralph Flanders of Vermont, a Republican, a conservative, a businessman, came to the Senate floor and said: Enough is enough. He asked for the censure of Senator McCarthy and allowed people once more in this country to speak freely.

Vermont has a great tradition we cherish. It is one I intend to uphold. I honor the Vermont tradition that includes Senator Flanders when I oppose cutting back the First Amendment and the Bill of Rights.

I know there is an impulse, a natural impulse, to restrict speech with which we disapprove. But America is strong because we do not fear freedom; we do not restrict freedom of speech. We should have confidence our institutions are stronger than a bunch of hooligans and that their ideas are better than those of cranks and crackpots.

We know the vast majority of the people in this great country are patriotic, especially thinking of September 11 the way the American people have demonstrated patriotism, as rarely in our history. I can never remember a time in our history when I have seen more people fly more flags, and proudly.

The crisis confronting America is not flag burning. Americans honor flags as a symbol of our country. Americans also know we face real challenges. The confidence of the American people and this Government and institutions is quite low. But even though confidence in the institutions of our Government may be low, Americans love their country. They respect the flag. It is the misuse of their Government for partisanship, the corruption of the Government and its processes, it is a lack of credibility and competence that they see in their Government that concerns Americans in the face of real threats and real problems.

Mark Twain said: Honor your country, question your Government. That is what is happening today.

I see respect for our flag in the actions and attitudes of the citizens of America. I see it in the dedication of Don Villemare and his friends of Essex Junction, VT, who stood and proudly waved American flags every single night after the horrible tragedy of September 11, 2001, until the search for remains officially ended. That was a vigil every single night in Essex Junction, VT—longer than 8 months. That is showing respect.

I see in Montpelier, my birthplace, in their annual Independence Day parade, where flags are waved in support of our country and our soldiers. I see it in the memorial of American flags planted along the paths of funeral processions of Vermonters killed serving their country in Iraq and Afghanistan. Vermonters' respect for the flag is born

from respect for this country and the values it protects. Our patriotism is felt, it is willful. It is not forced on us.

Instead of telling the American people, the people beyond the 100 who have the privilege of serving here, what they can and cannot do, maybe we should talk about what we 100 do and how we do it. We honor America when we in the Senate do our jobs, when and if we work on the matters that can improve the lives of ordinary Americans. Let the 100 Members of the Senate work to raise the minimum wage, lower gas prices, provide better health care and health insurance for more Americans. Let the 100 Senators act to fund the promise of stem cell research that could end the suffering of so many Americans.

The proposed amendment to the Constitution would do harm to the First Amendment protections that bind us all against oppression, especially the oppression of momentary majority thought. The amendment violates the precept laid down more than 200 years ago that "he that would make his own liberty secure must guard even his enemy from oppression."

It undercuts the principle that a free society is a society where it is safe to say and do the unpopular. Let us not give away our liberties in order to impose orthodoxy so others cannot offend.

Let me be clear, I am deeply offended when anyone defiles the American flag. I expect one thing that unites all 100 Senators is that every one of us is deeply offended when the flag is defiled. Two years ago, a flag incident occurred in Vermont outside St. Augustine's Church in Montpelier. Someone wrapped a statue of the Virgin Mary in the American flag and set it on fire. This is a church in which I have been baptized. When this act was first reported, I called it an act intended to outrage, an attack on the religious community, and a gross show of disrespect for the flag. We also know acts like these can and should be prosecuted under Vermont's law, as I suspect they should be under all of the laws of any of the 50 States. Laws prohibit such damage to property.

If someone seeks to do harm to the flag I proudly fly in my home when I am there, they, too, would be prosecuted under Vermont law. In fact, having been a prosecutor in Vermont, knowing what I know of Vermont juries, they would be convicted, but I can replace a flag of mine that was destroyed, and would. I can buy another flag. But if we act to diminish the Bill of Rights that protect our rights and freedoms of a quarter billion Americans and of generations to come, we cannot replace that. We cannot go to the store and buy a new Bill of Rights once it is diminished.

Ours is a powerful Constitution, all the more inspiring because of what it allows and because we protect each other's liberty. Let us be good stewards. Let us preserve and protect for

our children and our children's children a Constitution with the freedoms we were bequeathed by the founding patriots and by the sacrifice of generation after generation of Americans.

I urge Senators to think about this vote. Do not diminish that pillar on which our democracy and our freedoms depend. Do not cut back on the First Amendment of our Bill of Rights for the first time in American history.

I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Utah.

Mr. HATCH. Mr. President, I will respond, but first I ask unanimous consent to allow the distinguished Senator from Alabama to speak, and then allow me to go next.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

The Senator from Alabama.

Mr. SHELBY. Mr. President, I rise today to express my strong support for the antFLAG desecration resolution that is before the Senate this afternoon.

Mr. President, 229 years ago this month, the Continental Congress adopted a resolution giving the United States a flag, the stars and stripes, the American flag that we know today. There is no greater symbol of our freedom and our liberty.

The stars and stripes epitomize the underpinnings of the United States, that which was envisioned and created by the Founders of this great Nation, solidified by the Framers of the Constitution, and represented at that first Continental Congress.

Old Glory was raised at Iwo Jima, was placed on the Moon, and drapes the coffin of every servicemember who has sacrificed his life for our Nation. Our flag is emblematic of liberty and democracy. It honors all those who have defended our Nation from enemies at home and abroad, and all those who carried it into battle and never returned.

Yet there are some throughout this country who have chosen to express their views and opinions by defacing and even burning the flag. They believe the flag is simply a piece of fabric upon which stars and stripes have been sewn. They refuse to respect and revere the flag as a true monument to the freedoms and ideals of our great Nation. These notions were bolstered by a 1989 Supreme Court decision that protected the desecration of the flag.

Throughout the history of our Nation, the flag has been protected by laws. In fact, before the Supreme Court decision in 1989, 48 States and the District of Columbia had laws regulating the physical misuse of the American flag. Even today, a majority of Americans continue to believe the flag should be protected, that the Court was basically wrong in their decision.

It is that strong support and my firm belief that we must protect the flag that has sent me here today to advocate for this resolution. While some

have argued we should simply accept court interpretations of first amendment issues as final, irreversible truths, I disagree. Our system of government is based upon checks and balances and allows for legislative reactions to judicial decisions.

While rarely invoked, amending the Constitution is a reasonable reaction to a controversial and clearly wrong-headed court decision. The American system of government provided for amendments, and there are some issues that deserve that attention. I believe protecting the flag is one.

In debating this issue, we must look beyond burning the flag and protecting one's freedom of expression. This issue must be considered in a broader context. We must remember that this issue is about respecting the single unifying symbol of this great democracy, the American flag.

Defacing the U.S. Capitol or the Washington Monument would never be considered legitimate acts of free speech. The flag should be entitled to the same considerations. The flag is a national treasure, a monument, even, and like other national treasures, it deserves to be protected and respected.

Our flag is a unique national symbol that represents common values, shared aspirations, and the sacrifices of millions of Americans. The argument is not about legitimate free speech, in my judgment, but, rather, the extent to which free people must tolerate offensive acts. While some will say that a constitutional amendment to ban flag burning unduly inhibits free speech, I respectfully disagree.

Let me be clear. It will not diminish the Bill of Rights, in my judgment, to allow Congress to define and enforce a law which protects the American flag much like other national treasures are protected. To desecrate the American flag, in my judgment, is to desecrate the memory of the hundreds of thousands of Americans who have sacrificed their lives to keep our flag flying. It is to destroy everything this country represents.

There are some things that just need to be treated with respect and reverence for no other reason than to honor all those who have served and died for this country.

When we look at our flag, I believe we should see more than a piece of fabric colored red, white, and blue. We should see our Nation and all that it symbolizes. Our Armed Forces put their lives on the line daily to defend what Old Glory represents. We have a duty and a responsibility to honor their sacrifices by giving the flag the constitutional protection it deserves.

At this time, before I yield the floor, I thank Senator HATCH for all of his work in this regard and also for yielding me time.

The PRESIDING OFFICER (Mr. BENNETT). Under the previous order, the Senator from Utah is recognized.

Mr. HATCH. Thank you, Mr. President.

Mr. President, this amendment is a bipartisan amendment. It is overwhelmingly bipartisan. We have always gotten over 60 votes. The House of Representatives passes it overwhelmingly and gets the requisite two-thirds vote every time. It has always been stopped here in the Senate.

Bringing it up at this time is certainly not an election-year ploy, as we have Democrats and Republicans who feel very deeply about this issue. It is bipartisan. The last time we brought it up was in the year 2000. If I had my way, we would have brought it up every one of those intervening years so the American people could really realize what is involved here.

So today we begin the debate on the flag protection amendment. This is an important debate. This is a constitutional amendment. It ought to be difficult to pass any constitutional amendment, and they truly make it difficult, requiring a two-thirds vote of both bodies. Assuming we get those votes and it passes both bodies, it has to be submitted to the States, and 38 States would have to ratify it, at least 38, in other words, three-quarters of the States.

I thank my colleagues on both sides of the aisle for supporting this effort. I especially thank my colleague, the chairman of the Judiciary Committee, Senator SPECTER, for working so hard to see this amendment through the committee. I thank my dear friend from Alabama who just spoke because, in his own cogent, very clear spoken way, he has made it very clear this is not some inconsequential, inconsiderate, partisan thing that is going on here. I also thank the majority leader, Senator FRIST, for bringing it to the floor.

Like I say, this is an important debate. A lot depends on this debate. In fact, I would say it is a critical debate. Should this amendment pass, we will restore—that is a very important word—the power of the people over their own Constitution. We will make it clear that in America it is the people, not the judges, who are sovereign.

This is a debate worth having. There has been a lot of misunderstanding about this amendment. I believe even the distinguished ranking member on the committee has misconstrued this amendment in his remarks here today. This is what the amendment says. It is simple. It has nothing to do with free speech. The amendment says:

The Congress shall have power to prohibit the physical desecration of the flag of the United States.

Let's read that again. It does not ban anything. It says:

The Congress shall have power to prohibit the physical desecration of the flag of the United States.

This body and the other body will have the power. The other body has already voted it out of that body by a two-thirds vote. Some say we are only one vote short of having 67 votes. Some want to make this a partisan debate. It

is not. Some want to make it an election-year debate. It is not. This is a bipartisan debate over whether we are going to stand up and restore the Constitution to what it was before five unelected Justices on the U.S. Supreme Court—to four who totally disagreed with them—decided to change the Constitution. Those who argue that this is a change of the Bill of Rights have failed to recognize there are millions in this country—the vast majority—who differ with those five unelected Justices. And there were four with an opinion, written by arguably one of the most liberal Justices on the court, Justice Stevens, saying that desecrating the flag is not free speech but offensive conduct.

But even if you want to make that argument, it does not belong here in the context of this debate because what we are arguing is whether we can restore the Constitution to what it was before five unelected jurists, Justices, on the Supreme Court changed it.

The Congress shall have power to prohibit the physical desecration of the flag of the United States.

I have heard Senators on this floor criticize the administration and other administrations on both sides of the aisle saying that they have usurped the powers of the Congress of the United States. Yet some of them who are voting against this amendment turn around and fail to stop the usurpation of powers by the Supreme Court of the United States in a 5 to 4 decision.

Well, don't miss the point here.

The Congress shall have power to prohibit the physical desecration of the flag of the United States.

That is what this amendment says. It is a simple statement of the power of the people and of their Representatives in Congress. So all the high-flown talk about the Bill of Rights and this is going to be the first time the Bill of Rights will be overturned—come on, the Bill of Rights was overturned when five unelected jurists changed it and changed the Constitution. Now we will get it back to the people.

This amendment does not ban anything. It does not amend the first amendment. It does not prohibit speech. What it does is simple. It restores the power of the people's Representatives to protect the flag from acts of physical desecration. That is it. That is it. It is that simple.

The Congress shall have power to prohibit the physical desecration of the flag of the United States.

In the United States, we have government by the people. The Declaration of Independence makes it clear that in this country—for that matter, in any just political community—the people are sovereign.

Sometimes we need to be reminded of this powerful truth. This is how Thomas Jefferson explained what he called "the common sense of the matter."

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain

unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men—

Now, get this last part:  
deriving their just Powers from the Consent of the Governed.

It is the first principle of the American founding, and it is one that the American people still hold true today. Government exists because of the people, and it only exists with their consent, meaning our consent.

The Constitution affirmed this when it began with "We the People." The people wrote the Constitution at the Convention. The people created the Congress and the courts. The people ratified the Constitution. They gave it life. And the people ratified the first amendment.

Yet, for too long, some unelected judges have mistakenly concluded that it is the courts that have exclusive dominion over the Constitution. This is a chance for us to say to the Supreme Court: We are not going to let you intermeddle in the affairs of the people themselves with regard to the flag of the United States.

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The Constitution began with "We the People." The people wrote the Constitution at the Constitutional Convention. The people created the Congress and the courts. The people ratified the Constitution and gave it life. And the people ratified the first amendment.

Yet the courts seem to say they are the only ones who have authority over the Constitution. This was certainly the case in 1989, when a severely divided Court reversed 200 years of American jurisprudence and overturned the considered judgment of the American people in almost every State.

For generations, the American people provided protections for their beloved symbol, the flag.

On June 20, 1989, 48 States and the District of Columbia had statutes that protected the flag from physical desecration.

On June 21, 1989, all of those statutes suddenly became unconstitutional—all of the people's statutes, all of that work by all of these legislatures and the District of Columbia. All of them were ruled unconstitutional by five unelected Justices who were contested by four Justices on the Court.

Now, how did this come to pass? One vote on the Supreme Court switched, one vote. That is it. One vote and the will of the people in virtually every State in the Union was overturned—in nearly every State. One vote, one person—five people.

For many years, the Court well understood the obvious and compelling interest of political communities in protecting the American flag from desecration. In 1907, Justice Harlan wrote for the Supreme Court in *Halter v. Nebraska*. That decision reviewed a

Nebraskan statute protecting the flag from physical misuse.

This was Justice Harlan's—one of the all-time greatest Justices on the Supreme Court—conclusion:

It is not remarkable that the American people, acting through the legislative branch of the Government, early in their history, prescribed a flag as symbolical of the existence and sovereignty of the Nation . . . [L]ove both of the common country and of the state will diminish in proportion as respect for the flag is weakened. Therefore, a state will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any disrespect is shown towards it.

In short, there was a clear interest in providing protection for the American flag, recognized by one of the greatest Justices in the history of the Supreme Court.

Now, following this holding in the Court, the National Conference of Commissioners on Uniform State Laws approved the Uniform Flag Act in 1917. Section 3 of that act provided that:

No person shall publicly mutilate, deface, defile, trample upon, or by any word or act cast contempt upon any such flag, standard, color, ensign, or shield.

Now, many States used this Federal statute as a model for their State statutes or to supplement existing statutes.

There is no doubt that desecrating a flag is meant to express something. But as the late Chief Justice Rehnquist understood, that expression is more akin to an "inarticulate grunt" than a serious public statement when they desecrate the flag. The States concurred when they did their own balancing of the interests of the political community in protecting the flag with the interest of the individual in expressing himself.

The Court agreed that not all expressive conduct could simply be labeled speech and given full first amendment protection. As the Supreme Court explained in *United States v. O'Brien*:

[W]e cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends to express an idea.

In instances where expressive conduct, not speech, is at issue, the Court must balance the interests of the community in prohibiting this conduct with the interests of the person who wishes to express himself or herself. With regard to flag burning, the Court's approach was measured. In *Smith v. Goguen*, the Court overturned a flag desecration conviction in Massachusetts, concluding that the statute which punished words and acts of desecration was void for vagrants. The Court added, however, that:

nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags.

This is the Supreme Court. The Court pointed to the Federal flag protection statute, one which prohibited only physical desecration rather than

words, as an example of a constitutionally permissible statute. And so it was, until five unelected Justices changed it—actually, until one vote changed it, one vote combined with the four who had always voted against the flag.

The Court and the people were in agreement. Not all expressive conduct can receive first amendment protection. The Government's interest in protecting the American flag from physical desecration was a real one. But be that as it may, we could argue right now about whether this is conduct or whether it is speech. The fact is, we are not talking about free speech. We are talking about restoring the Constitution to what it was before five unelected judges or Justices on the Supreme Court changed it. And it really came down to one changed vote on the Court because the Court had always upheld amendments that protected the flag from acts of physical desecration.

The flag is a unique symbol of our nationhood that demands protection. The American people do not share a common religion or common political beliefs. We do not share a common ethnic heritage. But there are a few public symbols we do share as people. The American flag is a unique representation of our remarkable union. Its 13 stripes represent our origins as a nation, and its 50 stars, separate but unified on a field of blue, represent what we have become. From a small outpost of the Colonies fighting for freedom, we have become a beacon of liberty to the whole world.

For years, interest in protecting this symbol was deemed strong and real enough to rebut serious constitutional challenges. What changed? Why do the American people no longer have the right to protect the flag from acts of physical desecration? Why can't the Congress do that? One vote switched and went with the other four, and all of these rights were gone. So to those who say this is a denigration of the first amendment, the first amendment was denigrated when five unelected Justices took the power away from the people.

Prior to 1989, 48 States protected the flag, and the other two basically stood for protecting the flag, and the District of Columbia. I am not making this up. On June 20, 1989, nearly every State had laws protecting the flag from physical desecration. All those States rights, all the people's rights, were wiped out when one person changed his vote on the Supreme Court. One day later, after June 20, 1989, all of these State laws were unconstitutional. All that changed is the Supreme Court determined that it would disregard the beliefs of the American people and their representatives in Congress and in the States.

When the Supreme Court had the opportunity to execute its balancing test in *Texas v. Johnson*, balancing the interests of the people and prohibiting certain conduct with the individual's

interest in expressing himself in a particular manner, the Justices put their finger on the scale. They rejected as insufficient the States' interests, all of these States and their interests, one supported by the people in protecting the flag. They did not do so through a unanimous opinion. The Justices were severely divided, issuing a 5-to-4 decision. The dissent of Justice John Paul Stevens, arguably one of the most liberal Justices in history, was compelling. He dissented from that five-person majority case. He spoke for the opinion that the Court had arbitrarily abandoned. Here is what Justice Stevens said:

The Court . . . is quite wrong in blandly asserting that respondent "was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values." Respondent was prosecuted because of the method he chose to express his dissatisfaction with those policies. Had he chosen to spray-paint—or perhaps convey with a motion picture projector—his message of dissatisfaction on the facade of the Lincoln Memorial, there would be no question about the power of the Government to prohibit his means of expression. The prohibition would be supported by the legitimate interest in preserving the quality of an important national asset. Though the asset at stake in this case is intangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag.

That is Justice Stevens, who wrote the opinion for the Court and who many would arguably say may be the most liberal Justice on the Court. The American people agreed: the Court got this one wrong. They got it very wrong. So Congress acted immediately. We believed that Congress did have the power to protect the flag. For well over 100 years, the Court had upheld State and Federal protection measures.

On July 18, 1989, two separate measures were introduced in the Senate. Former Senators Robert Dole, Alan Dixon, Strom Thurmond, and Howell Heflin introduced S.J. Res. 180, which would restore the power to protect the flag to the States and affirm the existing power of Congress to do so. On the same day, Senators JOSEPH BIDEN, William Roth, and William Cohen introduced the Flag Protection Act.

While the amendment would have merely restored and confirmed the power of the people's representatives to protect the flag, as this resolution does, this statute which was filed by Senators BIDEN, Roth, and Cohen would have actually codified that legal protection.

Ultimately, the Senate acted on the bill authored by my colleague from Delaware, Senator BIDEN. As chairman of the Judiciary Committee, he was committed to resolving this issue. He held four hearings with 20 hours of testimony and 26 witnesses. I was there. After consulting with many experts, he was convinced that his bill would pass constitutional muster. It was a great bill, consistent with the desires of the American people. It provided extremely broad protection for our Amer-

ican flag. This is what became law. This is Senator BIDEN's language and others of us who supported it:

[W]hoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground or tramples upon any flag of the United States shall be fined under this Title or imprisoned for not more than one year, or both.

This bill passed by an overwhelmingly bipartisan vote. There are not many things which go through the Senate on a vote of 91 to 9, but the determination to pass a constitutional statute to protect the flag from physical desecration was one of them. Going back and looking at that rollcall vote, we should be proud of our actions. Current Senators, including my colleagues on the Judiciary Committee, Senators BIDEN and HERB KOHL, supported the bill. So too did my colleague from Kentucky, Senator MCCONNELL, who has since been elected majority whip. A number of other Senators who are no longer here supported this as well, including former Democratic leader Tom Daschle. It was a good bill. But the Supreme Court had other ideas.

On June 11, 1990, the Supreme Court struck down this overwhelmingly congressionally approved statute in *United States v. Eichman*. Again, this Court was severely divided along familiar lines. So what now? What course of action is available to Congress? They have made it clear you can't do this by statute. They made it abundantly clear. The Court had given us its opinion. It said that statutory protection of the American flag was not content-neutral and therefore violated core constitutional rights to expressive conduct. An amendment really is the only way we can solve this problem. So Congress began to focus its attention on a constitutional amendment that would restore the power of the people to protect the flag from acts of physical desecration.

Those who supported this amendment believed that the Court got this one wrong, badly wrong, and it was up to the people to correct these decisions. A constitutional amendment is really the only way to do it. I am not the only one who has thought so. Some of the most compelling statements on behalf of an amendment have come from my colleague from North Dakota, Senator CONRAD. In the past, he argued forcefully for an amendment to fix this problem:

Because I believe that the flag should have legal protection, I supported statutes last year and today to protect the American flag. But these attempts have failed. And now we are left with no other choice if we believe that the flag deserves protection.

Senator CONRAD went on to say:

We should let the States decide this matter. If we fail to adopt an amendment today, we will deny the States the right to express their views on this matter.

That was a statement made in 1990.

By approving the constitutional amendment before us, we will foster a healthy debate in this country about the Bill of Rights, the freedoms we enjoy, our constitutional

guarantees, and how we can legally and legitimately protect the flag. It is for these reasons that I will support a constitutional amendment in this body and let the people decide this important matter.

I agree with that. That statement was made on June 26, 1990. He was right. This is the way to create a debate all over the country that would be a debate on virtue and values. I couldn't have said it better myself than the way Senator CONRAD said it in 1990. An amendment really is the only way.

In a recent letter on this subject, Stephen Presser, professor of legal history at Northwestern University School of Law, explained that an amendment was and remains our only option. He said:

We were told by proponents of a statute to correct the Court's error in 1989 that they could draft one that would survive Constitutional challenge. I testified at a hearing before the Judiciary Committee at that time that it could not be done, and, sure enough, in 1990, the Supreme Court ruled in *U.S. v. Eichman* that the statute (which scholars such as Larry Tribe, for example, told us would be deemed constitutional) was unconstitutional. It is significant that Professor Tribe, along with his Harvard colleague Richard Parker have now clearly taken the position that no flag protection statute can pass Constitutional muster. They are correct: any statute would be deemed by the Court to be the government's unconstitutional favoring of one form of speech over another, and would thus be deemed to be unconstitutional content, discrimination with regard to speech.

A constitutional amendment is the only way. The alternative is to do nothing. Congress believed that it had the power to protect the flag; the Court disagreed.

I listen to many of my colleagues routinely complain that other branches are usurping the powers of Congress. I have heard that through my whole 30 years in the Congress. They are always complaining about the executive branch usurping the powers of Congress. The judicial branch is usurping the powers of Congress. Here we have a chance to restore those powers:

The Congress shall have the power to prohibit the physical desecration of the flag of the United States.

What does that ban? It doesn't ban a thing. All it says is that we are going to restore the power the Congress had before five unelected Jurists said we didn't have the power.

When we passed the Flag Protection Act in 1989, we believed we had the power to pass that bill. The Court had different ideas. They overturned this overwhelmingly bipartisan legislation. We have an overwhelmingly bipartisan constitutional amendment here. It isn't partisan. It is bipartisan. We will have people come on the Senate floor and try to make this a partisan issue, which is all too frequent around here, and ignore the fact that a lot of colleagues on both sides of the floor, an overwhelming number, are in favor of this amendment.

If we want a statute to do this, we need to restore our constitutional authority to pass it—the alternative to

our constitutional amendment, a simple amendment, restoring the power to the Congress. That is all it does. If you listen to the media, they act like it is going to be a ban. It would not be a ban. If we can pass this amendment and have it ratified by 38 States, I have no doubt there will be a constitutional debate on the floor as to what language will protect our beloved flag. It would take at least 60 votes on the floor of the Senate to pass any language because of our filibuster rule, so it is going to take a supermajority no matter what. We are not about that right now. That has nothing to do with this amendment, except it would be inevitable. What has to do with it is restoring the power to the Congress which was taken by five unelected Justices on the Supreme Court. If we want this type of statute, it is important to restore our constitutional authority to pass it.

As I said, the alternative to this amendment is to do absolutely nothing and acquiesce in the usurpation of our institutional power by another branch of Government. By doing nothing, we accede, through our inaction, to a decision by five unelected Justices who took the power from an American people over an important cultural issue.

Abraham Lincoln addressed this issue before becoming President. What do you do when the Supreme Court gets it wrong? This is what Lincoln taught us:

The candidate citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

Well, that is what Lincoln had to say. Are we going to just continue to allow five unelected Jurists to determine what the vast majority of the American people believe is right or are we going to continue to determine that they are taking away the power that the Congress has always had? We should restore that power? That is what this amendment does.

The answer in a democracy is that you let the people decide, especially on these sensitive, tough issues. I routinely hear some of my liberal colleagues who have recently re-minted themselves as progressives, complain that we don't listen to the people enough. They encourage direct democracy. They speak at blogging conventions. Let's see them put their money where their mouth is. There is nothing more discouraging to a democracy than a divided court abandoning its past precedent, overturning laws in 48 States, and overturning a duly passed Federal statute.

The reasonable reaction of many Americans might be: why bother? Why bother to write and e-mail and petition Congress? Why advocate on behalf of legislation? When it is all said and

done, the Supreme Court will appear *deus ex machina* and declare those laws unconstitutional, even absent any real precedent, text, or tradition to support its decision.

Fortunately, that hasn't been the reaction among our Nation's civic groups. Everybody from the American Legion, to the Fraternal Order of Police, to the Knights of Columbus has urged Congress to support this amendment. They have been tireless in their efforts. They see this constitutional amendment for what it is. All this constitutional amendment does is restore power to the people's representatives in Congress. Read it again:

The Congress shall have power to prohibit the physical desecration of the flag of the United States.

All it does is restore it to where it was. It was the Court that changed the Constitution. It is not us changing it. We are trying to restore it to where it was and send a message to the Supreme Court that on these great social issues you have to let the elected representatives of the people make these decisions for the people, and you should quit playing around with issues for which you should not have responsibility but the people should.

This is not a perennial partisan issue. This has not just been brought up because we are in an election year. I would bring it up every year if we could. The last time it came up was in 2000. This is overwhelmingly bipartisan. Republicans and Democrats, liberals, moderates, and conservatives all support our efforts. In fact, it makes you wonder who would not support it in the Congress because all we are trying to do is give the power back to the Congress.

Quite the contrary. It is broadly supported on both sides of the aisle, and the groups supporting it are distinctly nonpartisan.

At the Judiciary Committee markup of this resolution a few weeks ago, Senator FEINSTEIN spoke eloquently on its behalf. She has been one of the amendment's strongest supporters. Last week, this is what she had to say in an editorial in *USA Today*:

Throughout our Nation's history, the flag has been protected by law. In 1989, 48 of our 50 States had statutes restricting flag desecration. . . . But its protection ended in 1989, when the U.S. Supreme Court struck down a Texas law prohibiting flag desecration. Congress responded by passing the Flag Protection Act of 1989, but the Supreme Court struck down that law as well. The only way to restore protection to the flag is to amend the Constitution. Otherwise, any legislation passed by Congress would be struck down.

The Flag Protection Amendment would not prohibit flag burning. Rather, the amendment would simply return to Congress the ability to protect the flag as it has been protected throughout most of this Nation's history.

That is what she said. This is not a partisan issue. I am confident that all of this constitutional amendment's supporters would prefer to see it off the agenda. We want it passed and sent to

the American people for ratification. We are getting very close. We have voted on this amendment in the Senate only twice before. The last time we voted on it was in 2000. Right now, we have 60 upfront cosponsors. Three of my colleagues who are not cosponsors voted for the amendment as Senators in 2000. Another three voted for it while members of the House of Representatives. These are people who are not among the 60.

In the case of Senator MENENDEZ, he is going to have the opportunity to vote for it twice in the same Congress—once as a Member of the House, where he did, and now as a Senator. That is pretty unique.

I have no doubt that if Members voted their consciences, we would be well above the required 67 votes. Unfortunately, radical special interest groups are strongly opposed to this amendment. It appears from some press accounts that they are prepared to bring down the hammer, unless some Members pull back their support with inspired and last-minute changes of heart.

I know many newspaper editorial boards oppose this amendment. They still think it is a banning amendment. They think we are banning flag desecration. No, we are not. Right now, this amendment says the Congress will have the power to prohibit the physical desecration of the flag of the United States. It doesn't ban anything. Many law professors—or some at least—oppose this amendment. The ACLU opposes this amendment. But the people support it. It is insulting to them to suggest that they want to amend the first amendment, as the talking points opposed to our effort put it. This proposal does not amend the first amendment; it restores the power of the people to the people.

Do over 60 colleagues oppose the first amendment? Bipartisan colleagues. Do the majority of Americans in every State oppose the first amendment? Do some of our Nation's finest civic organizations oppose the first amendment? Do four Justices on the Supreme Court of the United States oppose the first amendment? Of course not.

But they do think the Court got these decisions badly wrong. They think the people have the right to protect the flag, consistent with the first amendment. They think the opinion of five unelected Judges should not forever bind the American people.

We need to send this amendment to the States and let them determine whether they are going to ratify it. I guarantee you that it will create a debate on virtue, which has kept this country the greatest country in the world, and values, which our young people need to see more of. We will debate it in every State if we can pass this by 67 votes.

It is beyond time. I do not know what so many of my colleagues fear. They say this is not a major issue. Who is kidding whom? This is the American

flag. This is our national symbol. They say that flag burning is a rare occurrence. That is not that rare.

As this chart indicates—and I will put it up here—flag desecration is an ongoing offense against common decency. These are recent incidents of flag desecration: Montpelier, VT, June 19, 2004; Littleton, NH, September 9, 2004; Las Vegas, NV, September 11, 2004; Sarasota, FL, December 20, 2005; St. Clair Shores, MI, August 27, 2005; Beaumont, TX; Hurricane, UT, July 4, 2005, right on Independence Day; Maryville, TN, July 4, 2005; Murrieta, CA, July 2, 2005; Sarasota, FL, June 28, 2005. There are many more listed here; that is just mentioning some of these. We know there are a lot more than that, I am sure.

Look at this article that just happened a few days ago. A reward was offered Friday for information leading to the arrest of whoever burned seven American flags in the Marine Park section of Brooklyn this week. This is dated June 23, by the way, 2006, last week:

The flags, including one that was hung by a couple after their son was killed in the September 11, 2001, terrorist attacks. They were burned in what police said was a case of criminal mischief. Residents of seven homes woke up Thursday morning to find their flags torched, police said. Investigators said they believe the flag burning occurred some time overnight. "As we approach the celebration of our Nation's independence, this July 4, some vandal has defined our freedoms, rights, and liberties by setting fire to the American flag," said State Senator Martin Golden who offered a \$1,000 reward. "Flag burning is something we will not tolerate in our neighborhood".

Regina Coyle said:

I can't believe someone would actually invade our personal space. We lost so much. It is the flag.

Other residents said they found the vandalism equally upsetting.

All I can say is that you can go back in time and find hundreds, maybe even thousands of these incidents. We are not even talking about those we don't know about. For the American people, and for me, even one instance of flag burning is one too many. My brother died in the Second World War fighting for us. Another brother-in-law died in Vietnam. We buried our top sergeant marine brother-in-law in Arlington a year or so ago. I feel deeply about this.

The first amendment guarantees another right besides the freedom of speech. It gives the American people the right "to petition the Government for a redress of grievances." I have to tell you, the American people are aggrieved, sick and tired of unelected judges taking the most important issues out of the hands of the people and their representatives and acting like junior legislators who will draft our social policies for us. This is bad for democracy, and it is inconsistent with the American Constitution. The American people have spoken in a historic event. All 50 States—every one of them—have petitioned the Congress to

protect the American flag, every one of them. So if you hear some who are opposed to this constitutional amendment come on the Senate floor and say "this is political, this is an election year," think about that.

All 50 States have petitioned us to do what this amendment will do: restore the Constitution to what it was before these five unelected Justices changed it.

As I said before, if we are to be responsive to our constituents, we only have one option: We must pass this amendment and send it to the States for ratification.

I understand some of my colleagues have some reservations about the amendment. Some are very sincere—not all but some are. I urge them to trust the people, to trust their instincts.

This amendment is not going away so long as I serve in the Senate. I will certainly fight for it. Should we pass this amendment, I think we would see perhaps the greatest public debate that we have witnessed in our lifetime. The debate over ratification in every State will be an ongoing history lesson for younger Americans. It will bring them in contact with our veterans to whom we owe our freedom, and it will introduce them to the civic organizations that are the soul and spirit of our democracy.

Yes, there are some very fine people and noted people who don't think we should do this, but if you look at their comments, they are not that they don't think we should restore to the Congress that which the Congress should have. They are actually treating this amendment as if it is an absolute ban of free speech when, in fact, it has nothing to do with that.

I have to admit, if we pass this amendment and it is ratified, I am sure there will be a debate over what form of language should we have to protect our beloved flag. What is important is to have our young people come in contact with the veterans and others to whom we owe our freedoms.

The Constitution begins with "We the people," and in the end it is still we the people, it is the people's Constitution. We should send this constitutional amendment to the States. I want everybody to think about this. As we hear them talk about: Oh, we must protect our rights of free speech, and so forth, this doesn't have anything to do with free speech. Read the words. Indirectly, I guess you could say it does in the sense that undoubtedly there will be a debate if this is passed and ratified, but it would still take a supermajority of the Senate to pass any form of statute afterwards. There would be plenty of protections for those who would disagree with our position. But for those who argued against this amendment, many of whom are constantly arguing about the usurpation of congressional powers by the Executive, especially when the Executive is not of their own party, this

is a chance to restore the power back to the Congress that should never have been taken by five unelected Jurists to begin with.

We should send this amendment to the States. We should let the people decide because, after all, that is all we would be doing. If we pass this constitutional amendment, we will be turning it over to the people themselves. Whatever people want to debate they can, and it would take an overwhelming 38 States, or three-quarters of the States, to ratify this amendment so that it would become the 28th amendment to the Constitution.

I can't think of a more complete declaration of the rights of the people than this particular very simple amendment that "Congress shall have power to prohibit the physical desecration of the flag of the United States."

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. DURBIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DURBIN. Mr. President, pending before the Senate is S.J. Res. 12. It is a one-page resolution which is being suggested for passage by the Senate. It is a matter which we will likely debate the rest of this week. The reason we are going to spend this much time on it is because this one-page document represents a historic change in America. If this amendment were to be ratified, it would mark the first time in our nation's history that we would amend the Bill of Rights of the United States of America.

The handiwork of Thomas Jefferson and our Founding Fathers, which has guided our Nation for over 200 years, which has become a model for nations around the world in terms of liberty and freedom, is about to be changed if the sponsors of this amendment have their way.

It takes a great deal of audacity for anyone to step up and suggest to change the Constitution. It happens. There is an amendment process. But in this particular instance, I think what we are about to do is wrong.

Earlier this month, the Senate debated and voted on a constitutional amendment to ban same-sex marriage. This amendment was, of course, defeated. Now, as I said, we are debating this constitutional amendment to criminalize the desecration of the U.S. flag.

I am not quite sure that our Senate in which we serve still has its bearings. That we would so quickly consider amending this Constitution, which has served our Nation so well and for so many years, so frequently suggests to me that there may be something at work here that goes beyond constitutional law and constitutional study.

This marks the fifth time in 17 years that Congress has debated amending the U.S. Constitution to prohibit burning or desecration of the United States flag—the fifth time. In the final weeks of this Congress, with all of the other urgent challenges facing our Nation, why are we coming back to this amendment, having finished the same-sex marriage amendment unsuccessfully? Well, perhaps the argument has been made—and I think my colleague and friend from Utah, Senator HATCH, just made it—that there is a serious problem in America with flag-burning.

The Citizens Flag Alliance is a group that supports Senator HATCH's position on flag-burning, and they keep track of how many people in this Nation of about 300 million have actually engaged in this disgusting practice of burning our flag. So far, in the year 2006 in the United States of America, with almost 300 million people, the Citizens Flag Alliance has recorded two instances of flag burning—two—in the entire United States of America. There has been an average of only seven acts of flag desecration annually in America in the last 6 years. So to argue that we have this growing trend toward desecration and burning our flag defies the facts.

Here, the Citizens Flag Alliance gave us a State-by-State background where flags were burned or desecrated in the year 2004. So let's count. In this column of States: None. In this column of States: Two. And here in the State of Vermont: One. So three times in the year 2004, the Citizens Flag Alliance found three incidents where flags were desecrated—three times in the entire year.

In 2005, the same group reported a total of 12 instances—one a month in the United States of America—of people desecrating and burning flags. The source: The Citizens Flag Alliance that supports this.

So to suggest that the United States is somehow facing a rash of this disgusting conduct just isn't true. In fact, it rarely, if ever, happens.

So why would we change the handiwork and fine contribution to America of Thomas Jefferson and our Founding Fathers? I think there is more to the story than what we heard from one of the Senators who came before us a few moments ago. I wonder if there are things which we might be considering on the floor of the Senate of more importance to the people of this country.

Is changing the Constitution because 4 people desecrated American flags this year more important than finding a way to help 1 million Americans who lost their health insurance over the last 12 months? Is debating this amendment how Congress should be spending its time?

When we debated the constitutional amendment to ban gay marriage, I cited a Gallup poll from April. They went to 1,000 Americans and they asked them the following question: What do you think is the most important prob-

lem facing this country today—1,000 people across our Nation. Gay marriage—the subject of the constitutional amendment which was defeated and part of the Republican agenda 2 weeks ago—ranked 33rd on the list of important issues facing America in this recent poll.

But wait a minute. What about flag burning? When you ask 1,000 people across America the most important problem facing this country today, where did it show up on the list of American priorities? It didn't. Americans cited 42 different issues as pressing priorities for America, but banning flag-burning was nowhere to be found.

Last week a poll was taken by none other than Fox News. Even though they often fail in their self-proclaimed effort to be fair and balanced, they asked 900 registered voters around the country this question: Which one of the following issues do you think should be the top priority for Congress to work on this summer? This is Fox, my friends, Fox News. They asked 900 voters, and here are the choices they gave them: Iraq, immigration, gas prices, same-sex marriage, and flag-burning. What did our friends at Fox News discover? What percent of Democrats said flag-burning should be the top priority of Congress? Zero.

In the halls of Fox News, I am sure they said, of course you wouldn't expect the Democrats to be patriotic enough to understand that flag-burning is a top priority. No wonder none of the Democrats in our 900-person poll identified flag-burning as a top issue.

But wait. What percentage of Republicans said flag-burning should be the top priority of Congress? Zero. That was the single issue that united Democrats and Republicans. When they looked at the big issues that we could consider, Democrats and Republicans agreed this did not belong on the list.

But it is on the list of the Republican majority in this Senate, and we are going to spend a week on it. We are going to spend a week on it, instead of talking about energy policy in America and bringing down the cost of gasoline for families and businesses and farmers. We are going to spend a week debating this amendment, which the American people have not even identified as a serious priority or a serious problem, instead of dealing with health care in America. We are going to spend an entire week debating this, instead of addressing the issue of global warming, which is a threat not only to our generation, but generations to come.

This amendment is truly a solution in search of a problem. Why are we debating it again? We know the answer. We are here because the White House and the congressional Republican leadership are nervous about the upcoming elections. They want to exploit Americans' patriotism for their gain in November.

It is the same thing with the gay marriage amendment. It wasn't a priority for America; it is a priority for

Karl Rove and the Republican strategists.

The real issue here isn't the protection of the flag, it is the protection of the Republican majority. We are not setting out to protect Old Glory; we are setting out to protect old politicians. That is what this is about.

Sadly, Republican leaders are forcing this debate so they can accuse some who disagree with them of being unpatriotic and un-American. You heard it last week, didn't you? Republicans came to the floor and accused Democrats who wanted to start the withdrawal of troops from Iraq of wanting to cut and run. Cut and run, cut and run, over and over again, from the Republican side—this chest-thumping, bring them on, we are loyal to the President at any cost, rhetoric coming forth every single day on the Republican side of the aisle. Then GEN Casey pulled the rug out from under them. And by the end of the week, he took the same position as the Democrats had with their amendment before the U.S. Senate.

So this week the Republicans are going to come back and say that those who won't vote for this flag-burning amendment are somehow unpatriotic and un-American. I think the American people are a lot smarter than that. I think they are going to see this for the political ploy that it is.

I don't say this very often, but when it comes to changing our Constitution to ban flag-burning, I agree with Supreme Court Justice Antonin Scalia. Justice Scalia, arguably the most conservative member of the Supreme Court, was part of the majority who voted to strike down the statute that was previously written to ban flag-burning in 1989. He said in speeches that it made him "furious" not to be able to put that defendant who burned that flag in that case—whom he described as a "bearded, scruffy, sandal-wearing guy burning the American flag"—in jail. But in Justice Scalia's words:

I was handcuffed. I couldn't help it. That is my understanding of the first amendment. I can't do the nasty things I'd like to do.

Like Justice Scalia and most Americans, I am deeply and personally offended by the desecration of our flag. I think burning the flag is a form of protest that is crude and contemptible. But being contemptible and stupid is not unconstitutional in America.

I think we should show a little humility around here when it comes to changing the Constitution. So many of my colleagues are anxious to take a roller to a Rembrandt. Since the adoption of the Bill of Rights, Members of Congress have proposed more than 11,000 amendments to our Constitution. We have passed only 17, and one of these was Prohibition, which we later learned was a political mistake and was repealed.

Why are amendments to the Constitution so rare? Because throughout our history, Congress has always understood that we should change our

Constitution only under the most extraordinary circumstances. We should amend it only when it is absolutely essential. It is a sacred document. It is part of what defines us as America. To reach in and change Thomas Jefferson's Bill of Rights on the floor of the U.S. Senate should be an historic moment and every Member should take pause before they do it.

The flag-burning amendment fails the test. As the Washington Post put it recently in an editorial:

Members of Congress who would protect the flag thus do it far greater damage than a few miscreants with matches.

That is not just my opinion; it is shared by a lot of people. Colin Powell, a man who has given his life to America, in military service at the highest levels, here is what he said about this flag-burning amendment:

I understand how strongly so many of my fellow veterans and citizens feel about the flag and I understand the powerful sentiment of State legislatures for such an amendment. I feel the same sense of outrage. But I step back from amending the Constitution to relieve that outrage. The First Amendment exists to ensure that freedom of speech and expression applies not just to that with which we agree or disagree, but also that which we find outrageous. I would not amend that great shield of democracy to hammer a few miscreants. The flag will be flying proudly long after they have slunk away.

General Colin L. Powell.

Steve Chapman writes for the Chicago Tribune, and here is what he said:

If there is anything American conservatives should revere, it's the U.S. Constitution, a timeless work of political genius. Having provided the foundation for one of the freest societies and most durable democracies on Earth, it shouldn't be altered lightly or often.

Charles Fried is a leading conservative scholar who served as Solicitor General of the United States under President Reagan. Here is what he said:

The First Amendment to the United States Constitution has served us since 1791 through wars, including a civil war, and crises of every sort without the need for amendment. It is an icon of our freedom. To amend it now comes close to vandalism.

These are the words of Charles Fried:

Totalitarian countries fear dissenters sufficiently to suppress their protests. A free Nation relies on having the better argument.

Incidentally, if we were to pass this constitutional amendment, which Senator HATCH and others have brought to the floor, we would join ranks with only three other nations on Earth that ban flag-burning, and that roster of nations include the following: Cuba, China, and Iran. Oh, yes, and Iraq under Saddam Hussein.

If this amendment were to pass, it would be the first time since 1978—almost 30 years—that both Houses of Congress passed a constitutional amendment.

I recently read a book review in the New York Times. It was about another subject, but there was a quote in there that I think is so apropos. Francis Lieber was a 19th century political phi-

losopher and author of America's modern laws of war. He cautioned against weakening our Constitution during times of war when inflamed passions can make rash solutions seem reasonable. Listen to what Francis Lieber said, and reflect on what we are doing:

It requires the power of the Almighty and a whole century to grow an oak tree; but only a pair of arms, an ax and an hour or two to cut it down.

The Bill of Rights has served this Nation since 1791, and with one swift blow of this ax, we are going to chop into the first amendment.

I can understand why veterans, in particular, are offended by the desecration of the flag. They went to battle and risked their lives under the red, white, and blue. The current leadership of the American Legion, whom I respect very much and work with on many veterans' issues, supports this amendment. I respect them for their service to America and our national security. But, with all due respect, there are many veterans who disagree.

Keith Kreul is an Army veteran and past national commander of the American Legion. Listen to what he wrote in an editorial for the Leader Newspapers in Lyndhurst, NJ when the Congress considered this amendment in 1998. Here is what he said.

Our Nation was not founded on devotion to symbolic idols, but on principles, beliefs and ideals expressed in the Constitution and its Bill of Rights. American veterans who protected our banner in battle have not done so to protect a "golden calf." Instead, they carried the banner forward with reverence for what it represents—our beliefs and freedom for all. Therein lies the beauty of our flag.

So says the former National Commander of the American Legion, Keith Kreul.

Robert Williams was a bomber pilot in World War II with the legendary 332nd Fighter Group, better known as the Tuskegee Airmen. Listen to what he wrote in the Baltimore Afro-American newspaper when this amendment came up a few years ago:

Our unit would never have existed had it not been for the long tradition of—and respect for—lawful protest in our country. . . .

This Tuskegee Airman wrote:

I cringe when I see Congress preparing to pass a constitutional amendment that would rewrite the First Amendment—for the first time ever—to ban a form of protest. It is particularly hard for me as an American war veteran [Mr. Williams said] to see this action taken in the name of patriotism.

For while we as a country view our flag as the very essence of patriotism, it is in reality a symbol of that spirit. And if the proposed flag desecration amendment wins final approval, our flag will become a symbol without substance.

Mr. Williams went on to say:

Don't get me wrong. No one endorses the idea of burning the flag or desecrating it in any way. It is to me a very repugnant concept. But I find more threatening the idea that we would change the Constitution every time some American came up with a new repugnant way to protest.

And then there is John Glenn. What can you say about John Glenn, a fight-

er pilot in two wars, one of our premier astronauts, a great United States Senator, a marine with such a great record of public service? He risked his life so many times for this country. He flew under that flag so many times. Here is what he wrote in testimony to the Senate Judiciary Committee in 2004:

Like most Americans I have very, very strong feelings about our flag. Like most Americans, I have a gut reaction in opposition to anyone who would dare to demean, deface, or desecrate the flag of the United States. But also, like most Americans, I am concerned about any effort to amend the Constitution and the Bill of Rights.

I have watched as those who expressed qualms or doubts or reservations about this amendment run the risk of being smeared, of being labeled as unpatriotic or as a friend of flag burners. . . . Many of us feel uncomfortable talking about issues that involve such private and personal emotions. We do not wear our emotions on our sleeves, especially when it comes to how we feel about the flag and about patriotism. We do not parade around those things that are sacred to us.

John Glenn said he was speaking out against the flag burning amendment because "it would be a hollow victory indeed if we preserved the symbol of our freedoms by chipping away at fundamental freedoms themselves.

He went on to say:

The flag is the Nation's most powerful and emotional symbol. It is our most sacred symbol. And it is our most revered symbol. But it is a symbol. It symbolizes the freedoms that we have in this country, but it is not the freedoms themselves.

He is right. Our freedoms are dearer than their symbols. S.J. Res. 12 is overly vague and filled with potential loopholes. What do the words "flag desecration" mean? If someone took a flag and wrote on it, is that desecration? Here is an instance where the President of the United States, when he was walking through a ropeline, was handed an American flag and asked to sign it. I do not believe that is desecration of the flag. I don't think anyone would argue that question. But this amendment is not clear as to where you would draw a line. As gifted as my colleagues may be who have brought this amendment to the floor, I am afraid the language they brought is not going to stand the test of time. Will we prosecute people for wearing star-spangled bathing suits at the beach? How about a T-shirt that fashions the flag into a peace sign? Would we put people into jail for sitting on an American flag blanket at a Fourth of July picnic? Wiping their mouth with a flag napkin?

Instead of signing a name on a flag, what if someone wrote "death to America"? Is that now desecration? The symbol of the American flag is used to sell everything from cars to cupcakes. Should those ads be illegal?

One of the most haunting images from Hurricane Katrina was the photo of a frail, elderly African-American woman waiting for help with a blanket that looked like an American flag wrapped on her shoulders. Is that desecration? I don't think so.

Would we outlaw only future acts? Could a person be arrested for possessing a flag quilt that has been in the family for generations? Don't the police in America have more important things to do? How many hours would future Congresses spend trying to define what this amendment says?

There is a better way. A number of us are coming together on a bipartisan basis to propose a criminal statute that makes it clear that when someone damages the U.S. flag with intent to incite or produce imminent violence, when someone burns a flag to intentionally threaten or intimidate a person, when someone steals a flag that belongs to the Federal Government and destroys it, when someone steals a flag and destroys it on Federal land—all of these are specific acts that we would criminalize. That does not rise to the level of a constitutional amendment, but it says that we believe, on a bipartisan basis, the flag should be treated differently. The flag does deserve special respect. This narrowly tailored solution corrects the mistakes of the statute Congress passed in 1989 and the Supreme Court struck down a year later. That statute was too broad. This new proposal is specific and clear.

One of the celebrity supporters of the flag amendment is Rick Monday. I bring him up because he was a Chicago Cubs outfielder, and I am honored to represent the State of Illinois where there are many Cubs fans. He played for the Cubs from 1972 to 1976 and was well known and well liked.

Everyone respects Rick Monday's act of courage 30 years ago at a baseball game at Dodgers Stadium when he ran after two people who were about to light an American flag on fire. He grabbed the flag away just as it was about to be burned.

But I agree with an editorial published last week in the Chicago Sun-Times, which said the following:

Our appreciation of [Rick] Monday was not diminished by his appearance last week at a rally for the proposed flag desecration amendment—an event at which he exhibited the rescued flag, which was presented to him by the Dodgers. But however heartfelt this gesture was, it was wrongheaded in lending support to a manufactured cause with no real value except a political one, the equivalent of throwing red meat on the table.

Tommy Lasorda is a great baseball manager, and I follow baseball. The last time this amendment came up, Senator HATCH brought Tommy Lasorda in to testify. Tommy Lasorda recalled the incident; he was the manager of the Dodgers on the day it occurred, and Tommy Lasorda was emotional about these people trying to burn the flag and Rick Monday running to its rescue.

I asked Tommy Lasorda this question: Did they televise those two guys jumping out of the stands and burning the flag on the field?

He said, "No." I said, "Why not?"

"You televise that sort of thing," Tommy Lasorda said, "and it encourages it."

So what would be the effect of calling for a constitutional amendment on the floor of the Senate to ban an act that occurs so rarely in the United States? My fear is that it would only encourage people to consider that sort of thing. We would put a spotlight on it instead of saying it is only happening two or three times a year, it certainly is not a national epidemic deserving of a constitutional amendment.

This flag amendment is all about the next election so that people who vote against it can be labeled as unpatriotic and un-American. There are better ways to show our commitment to our Constitution and our flag and our veterans. How about health care for our veterans? How about making sure we keep our promises to those who return from battle, that we keep our promises to them that they be given medical care and housing and the education they were promised? I wish the people pushing this flag desecration amendment so hard would spend their energy on issues far more tangible to our Nation's veterans, such as health care.

Earlier this year, the President submitted his budget. He proposed to shortchange our veterans when it comes to their health. The President's budget would force more than 50,000 Illinois veterans, many of whom are low income, to pay more for their health care. Their monthly prescription drug costs would double.

The American Legion, one of the most zealous advocates for the flag burning amendment, recently issued an action alert letter and said they are very concerned about the underfunding of the VA. I salute the American Legion. I hope they will channel more energy into helping our veterans than into changing our Bill of Rights.

The commander in chief of the Veterans of Foreign Wars, Jim Mueller, said this about President Bush's fiscal year 2007 budget:

The proposal to increase military retiree healthcare premiums is absolutely unacceptable. . . . I urge Congress to ensure that those serving in uniform and those who served faithfully for many years are not forgotten in the budget process.

Hats off to the VFW and the American Legion for speaking out for veterans. Channel that energy into making sure that veterans get a fair shake instead of watching a week go by on the floor of the Senate where we debate this unnecessary constitutional amendment.

Giving the veterans a flag amendment is not substitute for health care.

Flag burning does disturb some veterans. Another way of showing respect for our veterans is to protect the sanctity of their funerals. I am going to be offering an amendment tomorrow to do just that.

By now, many Americans have heard of the disgraceful and hateful actions of one man named Fred Phelps. Mr. Phelps calls himself a minister, a religious minister. But his gospel seems to begin and end with hatred and intoler-

ance. About 15 years ago, this Mr. Phelps and a small band of his followers began picketing funerals of people who have died of HIV/AIDS. They have reportedly picketed 22,000 funerals.

When their vile acts of hatred and bigotry stop generating the publicity they seek, they looked for new targets. They began to stage protests at the funerals of our brave young men and women who have given their lives fighting for America in Iraq and Afghanistan. In the past year, these so-called Christians, these hate-mongers, who would use the Bible as their shield, have protested at more than 100 military funerals.

They claim the deaths of American Armed Forces, if you can believe this—they claim the deaths of American soldiers are God's punishment for Americans' tolerance of gays and lesbians. That is an affront to civilized behavior. There may well be a special place in the afterlife for people like Mr. Phelps, but there is no place for his brand of hatred at veterans' funerals in this life.

Last month, Congress passed and the President signed into law the Respect for America's Fallen Heroes Act, which prohibits their demonstrations at or around our national cemeteries. Tomorrow, I am going to offer an amendment to this measure—a statutory amendment not a constitutional amendment—to expand that previous law so it applies to the funerals of all veterans, whether they are buried in a national cemetery, a church cemetery, or anywhere else.

My amendment will also prohibit protests at funeral homes, houses of worship, and other locations where deceased veterans are honored and buried. We can honor our veterans and protect their loved ones from this intrusion on their grief without weakening our Constitution and the freedoms for which veterans fought.

I hope my colleagues join me. I will offer my proposal as an amendment to the Bennett/Clinton amendment to this underlying bill so we can, in one amendment, criminalize the burning and defacing of the flag and also protect military funerals from Mr. Phelps and others like him who would bring great disrespect at the funerals of our soldiers who deserve the highest respect.

I have been very careful in writing this amendment to make sure it follows the previous law, so there will be no successful constitutional challenges in that regard.

I am also considering an amendment which I think is long overdue. It would ban the consideration of constitutional amendments in election years. We have seen too darned much politicking with the Constitution in this Chamber this month.

James Madison wrote in Federalist 49 in 1788 that the U.S. Constitution should be amended only on "great and extraordinary occasions." It appears now that biennial elections are great

and extraordinary occasions in the minds of the Republican leadership of the Senate. Madison warned of the "danger of disturbing the public tranquility by interesting too strongly the public passions" through frequent constitutional amendments. Over 11,000 proposed constitutional amendments have been introduced in Congress, including 66 during the current 109th Congress.

Over the past three decades, the number of proposed constitutional amendments considered on the Senate floor has increased dramatically. When in doubt here, amend the Constitution: from two amendments between 1973 and 1983, to five amendments between 1983 and 1993, nine amendments between 1993 and 2003, to four already in this 3-year cycle since 2003.

There appears to be a trend toward considering constitutional amendments on the Senate floor during even-numbered years which, coincidentally, happen to be election years.

Constitutional amendments should be considered by Congress without politicization. We should consider these for the serious suggestions that they are, instead of electioneering, and that is what has happened too often on the floor of the Senate.

Americans' reverence for the flag does not have to be coerced or policed. It is something we feel in our bones. When it comes to the Bill of Rights, I trust Thomas Jefferson a lot more than Karl Rove. I believe the words of Thomas Jefferson have endured. I believe the political tactics of Mr. Rove and the Republican Party will not endure when it comes to using the Constitution for political purposes.

Remember what happened after September 11? Remember all the American flags that suddenly appeared? Stores sold out of flags. In a time of national trauma and grief, these flags were our comfort and our strength. They were a visible symbol of our unity and our faith that America would endure. Our Nation had suffered a terrible loss, but the American flag waved proudly.

Sadly, in the 5 years since then, with our Nation at war, there are those who seek to pit us one against the other for political reasons. Now they want to use our flag as a wedge issue in this election.

This political effort to "brand" the flag as belonging to one party causes some to feel sad and disillusioned. Bill Moyers, the journalist, thinker, and former Presidential adviser, was among many who felt troubled by the effort to redefine respect for the flag as a partisan issue.

Last year, Bill Moyers made a speech about freedom in America in which he talked about the flag. He offered some profound words of wisdom that are worth reflecting upon today. He said the following:

I wore my flag tonight. First time. Until now I haven't thought it necessary to display a little metallic icon of patriotism for everyone to see. It was enough to vote, pay my

taxes, perform my civic duties, speak my mind, and do my best to raise our kids to be good Americans.

Sometimes I would offer a small prayer of gratitude that I had been born in a country whose institutions sustained me, whose armed forces protected me, and whose ideals inspired me; I offered my heart's affections in return. It no more occurred to me to flaunt the flag on my chest than it did to pin my mother's picture on my lapel to prove her son's love. Mother knew where I stood; so does my country. I even tuck a valentine in my tax returns on April 15.

So what's this doing here? Well, I put it on to take it back. The flag's been hijacked and turned into a logo—the trademark of a monopoly on patriotism. On those Sunday morning talk shows, official chests appear adorned with the flag as if it is the good housekeeping seal of approval. During the State of the Union, did you notice Bush and Cheney wearing the flag? How come? No administration's patriotism is ever in doubt, only its policies. And the flag bestows no immunity from error. When I see flags sprouting on official lapels, I think of the time in China when I saw Mao's little red book on every official's desk, omnipresent and unread.

I think Bill Moyers had it right. The flag amendment should not be used as a proxy for patriotism.

I respect our flag as the symbol of the freedom granted to us by the Bill of Rights, and it is painful for me to see it burned or otherwise defiled. I strongly believe that flag burning is an insensitive and shameful act, but I believe that it would be destructive to amend the Bill of Rights for the first time in our nation's history and restrict the precious freedoms ensured by the first amendment, simply to address an act which occurs in America only a few times a year.

The real test of our belief in the Bill of Rights—the real test of our patriotism—is when we rise in defense of the rights of those whose views we disagree with or even despise. The right to free speech is a bedrock of our democracy. Amending our Constitution's Bill of Rights would be a strike against the very freedoms for which the flag stands and for which so many Americans have given their lives.

Mr. GRASSLEY. Mr. President, I rise today in support of S.J. Res. 12, the proposal to amend our Constitution to return to Congress the authority to legislate on the issue of flag desecration. Like my colleagues, I do not take lightly the concept of amending our Constitution, but in this area, a runaway judiciary has left us no choice.

No other emblem is as synonymous or representative of our Nation as the American flag. No other image depicts as readily the freedoms and ideals our men and women in uniform have battled for. Americans proudly fly our flag to demonstrate their love for our country and for their neighbors. Schoolchildren have been pledging allegiance to it every morning for decades. The American flag has been flown in times of battle, of victory, and of national tragedy. It is the most recognized symbol of freedom and democracy in the world.

Our flag should be protected from those who would desecrate it and demonstrate a basic lack of respect for our national heritage. At the very least, decisions about whether and how to protect our flag should be made by the legislative branch, not the unelected judiciary.

The proposal before us today would not immediately ban flag desecration, as its opponents would lead you to believe. Rather, it would return the power to legislate on the issue to Congress and the States, where it belongs. This constitutional amendment will restore the legislative authority to protect our flag to the legislative branch.

I will be voting in favor of this amendment, and I urge my colleagues to join me in doing the same.

I yield the floor.

The PRESIDING OFFICER (Mr. CORNYN). The assistant majority leader.

#### MORNING BUSINESS

Mr. MCCONNELL. I ask unanimous consent that there now be a period of morning business, with Senators permitted to speak for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### JUNETEENTH INDEPENDENCE DAY

Mr. LEVIN. Mr. President, during the week of June 19 through June 25, nationwide we celebrate in observance of Juneteenth Independence Day. Although passage of the 13th amendment in January 1865, legally abolished slavery, many African-Americans remained in servitude due to the slow dissemination of this news across the country. It was not until June 19, 1865, that Union troops reached Galveston, TX, and emancipated the last of the slaves. Since that time, over 130 years ago, the descendants of slaves have observed this anniversary of emancipation as a remembrance of one of the most tragic periods of our Nation's history. The suffering, degradation and brutality of slavery cannot be repaired, but the memory can serve to ensure that no such inhumanity is ever perpetrated again on American soil.

It is appropriate and necessary that we, as a nation, recognize Juneteenth and use this day to reflect upon how far we have come and how far we still have to go. While it was on this historic day in 1865 that slaves were finally freed of the onerous yoke of slavery, the same cannot be said about the burden of pervasive racial oppression and second-class citizenship, which would not be eradicated in earnest until 100 years later through the civil rights movement of the 1960s. Although we have made tremendous progress in eliminating discrimination and creating equal opportunities over the years, the American dream continues to elude the grasp of many Americans.

I would like to reflect on the courageous and revolutionary leaders who